Supreme Court, U. S.
FILED
MAR 8 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

Volume I

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-539

DAYTON BOARD OF EDUCATION,
WILLIAM E. GOODWIN,
JOSEPHINE GROFF and
JAMES D. HART,

Petitioners,

v.

MARK BRINKMAN,
PATTY BRINKMAN, and
PHILLIP BRINKMAN,
By Their Mother and Next Friend,
Donna Brinkman, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

Petition For Certiorari Filed October 18, 1976
Certiorari Granted January 17, 1977

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I. RELEVANT DOCKET ENTRIES

4-17-72	Complaint filed in District Court.
7-14-72	Plaintiffs file application in District Court for hearing on the request for preliminary injunction for 1972-73 school year.
7-24-72	Answer of Defendants Dayton Board, James D. Hart, William E. Goodwin and Josephine Groff filed in District Court.
11-13-72 to 12-1-72	District Court holds hearing on violation issues as framed by the District Court.
2-7-73	District Court issues its Findings of Fact and Memorandum Opinion of Law.
3-30-73	Plans of Dayton Board, minority members of Dayton Board and Superintendent filed with District Court.
4-24-73	Plaintiffs file in District Court objections to the plan proposed by the Board majority.
7-13-73	District Court issues its supplemental order on remedy.
7-23-73	Plaintiffs file notice of appeal with District Court.
8-13-73	Defendants Dayton Board, et al., file notice of appeal with District Court.
8-20-74	Court of Appeals issues opinion affirming District Court's holding of a cumulative violation and remands for formulation of an adequate desegregation plan.
1-7-75	District Court issues order requiring submission of plans.
2-3-75	Plan of Dayton Board filed with District Court.
2-3-75	Alternative plan of plaintiffs filed with District Court.

2-17-75 to 2-20-75 District Court holds hearings on plans submitted.

3-10-75 District Court issues order on remedy.

3-18-75 Plaintiffs file notice of appeal with District Court.

6-24-75 Court of Appeals issues opinion and remands action to District Court.

11-5-75 District Court Order requiring Dayton Board to submit plan on or before 12-1-75 and appointing Dr. John A. Finger as consultant.

11-18-75 Order of District Court relating to establishment of guidelines for plan.

12-2-75 Dayton Board submits desegregation plan to District Court for consideration.

12-8-75 to 12-9-75 District Court held hearing on plans submitted to Court.

12-29-75 District Court's order and judgment ordering redistribution of pupils and appointing Dr. John A. Finger, Jr. as Master.

1-2-76 District Court's supplemental order correcting factual issue in 12-29-75 order.

1-8-76 Motion filed with District Court by Dayton Board to alter or amend judgment.

3-15-76 Master files report with District Court and hearing set.

3-22-76 to 3-23-76 District Court held hearings on report of Master.

3-23-76 District Court's final order relating to desegregation plan.

3-25-76 Judgment entry of District Court embodying order of 3-23-76 filed.

4-15-76 Notice of appeal filed by Dayton Board with District Court.

4-15-76 Application of Dayton Board for stay.

4-19-76 Order of District Court denying stay.

5-11-76 Application of Dayton Board to District Court for modification of report of Master.

5-14-76 Order of District Court granting modification except as relates to eighth graders.

6-1-76 Motion of Dayton Board directed to Court of Appeals to stay judgment.

6-16-76 Order of Court of Appeals denying stay.

7-26-76 Order of Court of Appeals affirming District Court's judgment of March 25, 1976.

7-28-76 Motion of Dayton Board directed to Court of Appeals to stay judgment pending writ of certiorari.

8-16-76 Order of Court of Appeals denying motion for stay.

8-17-76 Application to Associate Justice of Supreme Court for stay.

8-19-76 Request for stay denied by Associate Justice; writ of certiorari filed with Supreme Court.

10-27-76 Request for certification and transmittal of record filed with District Court.

1-17-77 Petition for writ of certiorari granted by Supreme Court.

II. OPINIONS BELOW.

A. DISTRICT COURT'S FEBRUARY 7, 1973 FINDINGS OF FACT AND OPINION OF LAW.

(Filed February 7, 1973)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil No. 72-137

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al.,

Defendants.

**FINDINGS OF FACT AND
MEMORANDUM OPINION OF LAW**

This is a school desegregation suit brought as a class action by the parents of black children attending schools operated by the defendant Dayton (Ohio) Board of Education. This Court has proper equity jurisdiction under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution; see *Brown* v. *Board of Education,* 347 U.S. 483, 495 (1954); 349 U.S. 294,, 300-301 (1955), and under 28 U.S.C.A. §§ 1981 and 1983, 42 U.S.C.A. § 1343.

This matter is before the Court upon the briefs, stipulations and exhibits presented by the respective parties; and upon the record adduced during expedited hearing conducted by

Court from November 13 through December 1, 1972. The limited question before the Court at said hearing was whether acts by the defendant Dayton School Board have created segregated educational facilities in violation of the Equal Protection Clause.

Having carefully examined the evidence presented, the Court, pursuant to Rule 52(a), Fed. R. Civ. P., enters the following findings of fact and memorandum opinion of law.

I

FINDINGS OF FACT

A. Historical Perspective

(1) The evidence presented has established isolated but repeated instances of failure by the Dayton School Board to meet the standards of the Ohio law mandating an integrated school system.[1] Such instances include a physical segregation into separate buildings of pupils and teachers by race at the Garfield School in the early 1920's, a denial to blacks of access to swimming pools in high schools in the 1930's and 1940's and

[1] Section 3313.48, Ohio Revised Code, provides in relevant part that:

> "[t]he Board of Education of each city . . . shall provide for the free education of the youth of school age within the district under its jurisdiction at such places as will be most convenient for the attendance of the largest number thereof . . ."

This has been the law of Ohio since February 22, 1887, when it was enacted by 85 Ohio Laws 34. The statute was upheld and enforced in 1888 by the Supreme Court of Ohio in *Board of Education* v. *State*, 45 O.St. 555, as follows:

> "Section 4008 having been repealed by the Act of the General Assembly passed February 22, 1887 (84 Ohio Law 34), separate schools for colored children have been abolished and no regulation can be made under 4013 that does not apply to all children, irrespective of race or color:"

the exclusion, between 1938 and 1948, of black high school teams from the city athletic conference.[2]

Prior to *Brown*, however, physical isolation of black students ended, swimming pools were no longer restricted, and black athletic teams competed on an equal basis with all other Dayton High Schools.

While arguably consistent with the social mores of the times, the treatment of black children during this period was at least inhumane and by present standards, reprehensible. The practices of the Dayton School Board were also, during that period, in contravention of Ohio law as cited in n.1, *supra*. Both by reason of the substantial time that has elapsed and because these practices have ceased, however, the foregoing will not necessarily be deemed to be evidence of a continuing segregative policy.

(2) Not to be dismissed on a *deminimus* theory are the practices of the Dayton School Board with regard to the hiring and placement of its teachers. In the past thirty-odd years three separate policies have been followed. Until the decade of the 1930's, there was little, if any, hiring of black teachers. Those who were hired were used in instruction of predominately black classes. During and following World War II the black population of Dayton substantially increased. Black teachers were hired in greater number, although such teachers did not teach in schools which were predominately white. While there is no direct evidence that black teachers were forbidden to teach white children at any school, in practice few actually did. Some evidence consistent with the assumption that black educators and black principals would be more understanding, sympathetic, and inspiring to black students has been suggested to the Court.

[2] For a period in the 1930's and 1940's, the Shawen Acres Orphan Home sent its black and white wards to different schools. Some white children of medical personnel of the Veterans Hospital in Dayton were bused by the hospital to "white" schools. The Dayton School Board, while not initiating these practices, condoned and assisted them.

In the 1951-52 school year, the policy of assigning black teachers only to black schools ended and black teachers were gradually assigned to white or mixed schools. By 1963, under a policy designated as one of "dynamic gradualism," at least one black teacher had been assigned to all eleven high schools and to 35 of the 66 schools in the entire system.

By 1969 each school in the Dayton system had an integrated teaching staff consisting of at least one black faculty member. In the fall of 1971, pursuant to an agreement with the Department of Health, Education & Welfare (H.E.W.), the Dayton Board of Education commenced assigning faculty in such a manner that the ratio between black and white teachers in each school substantially reflected the ratio between black and white teachers in the system as a whole. Pursuant to this agreement the teaching staff of the Dayton Public Schools became and still remains substantially integrated.

By 1969 the Dayton School Board employed more black teachers than any other of the 20 largest school districts in Ohio. At that time 28.6% of all teachers were black while 38.3% of all students were black. For the school years 1971-72 and 1972-73, blacks comprised 38% of the non-teaching, non-administrative personnel employed by the Board of Education. Employment of blacks in other positions such as skilled craftsmen, however, remains substantially below the percentage of black students population or the percentage of black teachers and black administrators.

(3) In 1933, the Paul Lawrence Dunbar High School was established. Dunbar High School was intended to be, and did in fact became, a black high school, with an all black teacher and pupil population. At the time of its creation, there were no school attendance zones in Dayton and students were permitted liberal transfers. Attendance at Dunbar was voluntary.

In the 1940's and early 1950's, after reorganization into a K-8, 9-12 grade structure, high school and elementary school

attendance zones were established and encorced in Dayton. Dunbar continued to exist as a city-wide all-black high school until it closed in 1962.

B. The Dayton Public School System Today

(a) Racial Imbalance

(4) The great majority of all schools in the Dayton system today have student populations which are racially imbalanced, consistent with the black-white population and geographical distribution thereof as shown by the 1970 census.[3] Except at the Patterson Co-op High School, where in the past few years a concerted effort has been made to enroll more black students, no effort has been made by the school board of Dayton to balance by race the student population at any particular school. See Appendix A, *post* at 15.

(b) Attendance Zones

(5) There has been presented no evidence of boundary changes that would channel blacks or whites into specific schools or would restrict blacks from attending any school. Where construction of new schools has required boundary changes, they have been rational, reasonable and within the sound discretion of the Board of Education. No irregular school zones have been created, white students have not been bused past black schools to white schools, nor have black students been bused past white schools to black schools.

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[3] The 1970 census for the city of Dayton indicates 71 census tracts, 45 with a black population of less than 15%, eight with a black population between 15% and 85%, and six with a black population of 85% to 100%.

While the Dayton School District is not geographically identical to the city limits of the City of Dayton, the variations are non-significant in the context of the areas' black-white population.

(6) The Dayton School District contains 57 elementary school attendance areas. No evidence has been presented of gerrymandered boundary lines and the attendance districts are regular in shape. Boundary line changes have occurred only when new schools were constructed for the purpose of relieving overcrowding in existing ones. See Appendix A, *post*, at p. 15.

(7) The middle school program was established on January 4, 1971. Middle schools consist of grades 6, 7 and 8. The middle school program has to date been only partly effectuated in the Dayton system. Elementary schools (kindergarten through eight) are still in operation as well as primary schools (kindergarten through five), and middle schools (six through eight). At the present time there are five middle schools in Dayton: Cornell Heights, Longfellow, MacFarlane, Whittier, and Orville Wright. For the racial compositions of these schools, see Appendix A, *post*, at p. 15.

Attendance boundaries for the middle schools were established in September, 1971, and have neither segregative nor integrative effect.

(8) There are presently eleven high schools in Dayton, ten of which have specific attendance areas. The eleventh, Patterson Co-op High School, enrolls students from the entire district for its vocational education program. The black percentage of attendance at Patterson High School has increased due to an altering of recruitment techniques, from 2.0% in 1963 to 32.9% in 1972. No evidence has been presented that under the present selection system the admision of blacks is denied or discouraged or that the system is segregative in effect.

Dayton has constructed five high schools since 1954 and has altered attendance zones where necessary to accommodate the overcrowding of existing high schools. Other than such alterations, no attendance zone boundaries have been changed. No evidence of the establishment of high school boundary lines for the purpose of creating white high schools and black high schools has been presented.

(c) Site selection and construction

(9) Since 1954 the school board of Dayton has constructed 14 new elementary schools and 60 elementary school additions. The construction follows the pattern of growth in the Dayton area and follows the specific policy of "building schools where children are, or where they are expected to be." New construction of elementary schools was largely on the periphery of the center city. There are instances of errors in Board planning in that some areas have not developed as expected and other developed areas have not become part of the Dayton School District, as expected. There are examples of schools operating substantially below capacity. While reasonable minds might reasonably differ on selection and construction of some schools, sufficient evidence has not been presented that school construction was segregative in nature other than to provide schools in white neighborhoods which remain predominantly white and schools in black neighborhoods which remain predominantly black.

(10) Five new high schools and fourteen high school additions have been constructed in the past eighteen years. Constructions of some high schools followed the pattern of construction of elementary schools in that sites selected were away from the center of the city and in neighborhoods which were predominately white. Other sites could have been selected near the center of the city in black neighborhoods. Such schools would arguably, at least, have had a larger proportion of white attending such schools.

Site selection is a matter of judgment and no evidence has been presented that the Board of Education failed to use neutral criteria in its choices. In the construction of schools, the Board, over the years, has been presented with options. Plaintiffs have failed to sustain their burden of showing that the defendant Board exercised those options presented in an improper fashion.

(d) Optional zones

(11) The Board of Education of the Dayton School District has from time to time created optional zones. Optional zones are dual or overlapping attendance areas which allow children residing within them a choice among two or more schools. Some optional attendance zones were created where the more distant school geographically had better access; some were created where the more distant school did not require the crossing of busy intersections, commercial areas, or railroad tracks. Many were created for the convenience of parents. There has been evidence that at times this last concept embraced desires motivated by racial considerations. Seven optional elementary zones and four optional high school zones exist at the present time. All of the others have been abolished. See Appendix B, *post* at 16.

The majority of optional zones had no racial significance at the time of their creation. The Westwood-Jackson, Roosevelt-Colonel White, and Fairview-Roth zones may have constituted exceptions to this general rule and we cannot conclude that these did not have adverse racial effects. Similarly, although none of the elementary school optional zones today have any significant potential effects in terms of increased racial separation, the same cannot be said of the high school optional zones. Two of these zones, those between Roosevelt and Colonel White and between Kiser and Colonel White, are by far the largest in the system and have had the most demonstrable racial effects in the past.

(e) Freedom of Enrollment

(12) By two separate actions the Board of Education has established a "freedom of Enrollment" policy. On May 29, 1969, action was taken whereby the parents of a pupil in good standing in the Dayton Public School District could request

assignment of the pupil to any school building within the district where space was available to accommodate him. Three priorities were established.

(1) Students residing within the attendance area of a school building shall have first priority to assignment to that building.

(2) Students meeting the requirements for a course available only in the particular building shall have second priority for attendance in that building;

(3) A student desiring enrollment in any building for whatever reason shall have third priority in that building, providing his enrollment will contribute to improved racial balance in that building.

The action of May, 1969, further provided that transportation would be the responsibility of the parents.

On January 3, 1972, the Board of Education resolved to continue the Freedom of Enrollment policy with the exception that the Superintendent and his staff were directed to develop and submit before the start of the second semester of the 1971-72 school year a plan providing for the free transportation of the students participating in such program. Such free transportation was adopted by the Board prior to the filing of the complaint herein.

(13) Applications for transfer and dispositions thereof during the school years 1969-1970, 1970-71, 1971-72, 1972-73, are set forth in Appendix C, *post*, at 17. There is no evidence that the Freedom of Enrollment system has been unfairly operated or that black students have been denied transfers because of their race. There is evidence that the capacity of transferee schools has been underestimated and that projections of future enrollment are substantially overestimated. A neutrally administered freedom of enrollment system might in the future reduce somewhat racial imbalance and remove community perception of "black" and "white" schools. However, as the Freedom of Enrollment system is presently constituted, its input towards that goal has been slight. Requests for

transfer have at no time exceeded 1.5% of the total student enrollment.

C. School Board Action — December, 1971 January, 1972

(14) At the general election in November, 1971, the electors of the school district of Dayton elected three members for a four year term commencing January 1, 1972. Issues at such election involved the matter of school attendance zones and transportation of pupils. Two incumbent members of the Board ran for reelection, one did not. One incumbent was reelected and two new members of the Board were added. On December 8, 1971, the 1971 Board met to consider resolutions dea'ing with transportation of students and zone attendance lines. All members present were duly elected, qualified and acting members of the Board, although two of them were so-called 'lame ducks," who would not be members of the Board after December 31, 1971.

The Board adopted several resolutions. These resolutions recognized the existence of racial segregation in the Dayton schools, the role played by the Board in the creation of the racial patterns and the concommitant responsibility of the Board to eradicate these patterns through affirmative action. The types of affirmative action recognized included the elimination of the old attendance zones and the transportation of students for the purpose of achieving the city-wide racial balance of students. These resolutions, which are set forth in part in Appendix D, *post*, at 18-22, were adopted by the Dayton School Board by a vote of 5-2.

Immediately thereafter, one member of the Board who had voted with the majority, requested reconsideration and was improperly ruled out of order. The Board met subsequently on December 6, 1971 [sic], and January 3, 1972. At the end of the latter meeting, the Board ended its term of office and the 1972 Board took its p'ace. On January 3, at its first meeting, the 1972 Board rescinded the resolutions passed on

December 8. Since the 1971 Board had passed out of existence, the action of the 1972 Board on January 3, 1972, was not in the nature of a reconsideration but instead was a recission of the previous action.

The right of the majority to override protected minority rights has clear limitations in our constitutional democracy. See *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Hunter* v. *Erickson*, 393 U.S. 385 (1969); also see *Alkire* v. *Cashman*, — F.Supp. — (S.D. Ohio E.D. 1972). The recission in early 1972 of the resolutions adopted by the 1971 School Board constituted an independent violation of the Equal Protection Clause rights enjoyed by the black minority of Dayton. See *Bradley* v. *Milliken*, 433 F.2d 897 (C.A.6 1970); *Oliver* v. *Kalamazoo Board of Education*, 346 F.Supp. 766 (W.D. Mich. S.D. 1971), *aff'd.* 448 F.2d 635 (C.A.6 1971).

OPINION

An examination of the decisional law of this circuit does not provide an identifiable category for the Dayton Public School System. Ohio law, unlike the law of many Southern states, has never mandated the separation of the races in public school; to the contrary, since 1887 it has specifically prohibited this practice. See n.1, supra. The Dayton system is a square peg for the round holes of Memphis, Knoxville, and other southern cities.[4] It is, however, also a round peg

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[4] Compare, for example, the intransigence of the Nashville School Board in *Kelley* v. *Metropolitan County Bd.*, — F.2d — Nos. 71-1778 & 79 (C.A. 6 May 30, 1972). See also *Northcross* v. *Board of Education of Memphis*, 420 F.2d 546 (C.A.6 1970), *aff'd.* 397 U.S. 232 (1970); 444 F.2d 1179, 1184 (C.A.6 1971); *Goss* v. *Board of Education of Knoxville*, 301 F.2d 164 (C.A.6 1962); 305 F.2d 523 (C.A.6 1962); 406 F.2d 1183 (C.A.6 1969); 444 F.2d 632 (C.A.6 1971); *motion for implementation order denied*, 403 U.S. 956 (1971); *Robinson* v. *Shelby County Board of Education*, 442 F.2d 259 (C.A.6 1971); *Mapp* v. *Board of Education of City of Chattanooga*, — F.2d — (C.A.6 October 11, 1972), *rehearing en banc granted* — F.2d — (C.A.6 1972).

for the square hole that is Cincinnati in *Deal* v. *Board of Education*.[5] In *Deal*, which dealt with an urban school system organized under the laws of Ohio, there was no finding that the actions of the school board had contributed in *any* fashion to the segregation of the Cincinnati public schools. We have not found the *Keyes* situation of the transfer of whites to remaining predominately white schools.[6] We have not found the *Bradley* altered attendance zones or the transfer programs that allowed whites to escape from identifiably black neighborhood schools.[7] We have not found the *Davis* pattern of racial discrimination.[8]

What we have found are racially imbalanced schools, optional attendance zones, and recent Board action, which are cumulatively in violation of the Equal Protection Clause. We hold that the totality of these findings require intervention by this Court under the mandate of *Brown* v. *Board of Education*, *supra*.

We do not hold that a school board may not in its wisdom determine to establish 'neighborhood schools." *Gilliam* v. *School Board of Hopewell*, 345 F.2d 325; *Deal*, *supra*; *Goss*, *supra*. But an "optional attendance zone" is a limitation upon this

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[5] 369 F.2d 55 (C.A.6 1966); 419 F.2d 1387 (C.A.6 1969), *cert. den.* 402 U.S. 962 (1971).

[6] *Keyes* v. *School District No. 1*, 303 F.Supp. 279, 289 (D.C. Colo. 1969); 313 F.Supp. 61, 90 (D.C. Colo. 1970), *aff'd. in part, rev'd. in part*, 445 F.2d 990 (C.A.10 1971), *cert. granted* —— U.S. —— (1972).

[7] *Bradley* v. *Milliken*, 338 F.Supp. 582 (E.D. Mich. 1971), *aff'd.* —— F.2d ——, Nos. 72-1809, 72-1814 (C.A.6 Dec. 8, 1972), *rehearing en banc granted* —— F.2d —— (C.A. 6, Jan. 16, 1973). See also *Clemons* v. *Board of Education of Hillsboro*, 228 F.2d 853 (C.A.6 1956).

[8] *Davis* v. *School District of Pontiac*, 443 F.2d 573 (C.A.6 1971), *cert. den.* 404 U.S. 913 (1971).

concept and if carried to an ultimate conclusion, effectively destroys it. If a school board elects to use the neighborhood school concept, it must do so fully and completely. Where there are hazards, natural or artificial, it must so adjust the boundaries in order to protect the children it intends to educate. It may not employ optional zones either to destroy or dilute the neighborhood school concept.

In addition, there appear to be aspects of the system which may in the future become segregative in effect unless steps are now taken that will retard these undesirable tendencies. Without seeking to calibrate the degree of segregation that inheres in individual policies of the Board, we hold that these must be refashioned in such manner as to avoid such future racially disharmonious potential.

Accordingly, the Dayton School Board is hereby instructed to prepare and present to this Court within sixty (60) days a plan that will accomplish the following:

(1) Abolish all optional attendance zones presently remaining within the Dayton school system;

(2) Restate the priorities for high school attendance in the freedom of enrollment plan in order that no student of a minority race may be denied attendance at any high school in the Dayton Public School System and so that transfers for purpose of improving racial balance take precedence over curriculum transfers;

(3) Maintain faculty assignment policies that will reflect in each school the approximate ratio of black to white faculty throughout the district.

(4) Establish hiring policies that will enable the clerical and maintenance personnel hired by the school board of Dayton to approximate the proportion of black-to-white ratio of the Dayton School District.

The foregoing enumerated specifics shall be considered as a minimum. The plan submitted by the defendant Board shall

in all other respects conform to the requirements of law. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1970); *Davis* v. *Board of School Commissioners of Mobile County, Ala.*, 402 U.S. 33 (1970).

Irrespective of the determination of this Court there will remain in the city of Dayton a substantial black population entitled as a matter of law to equality in education, housing, and job opportunity. No peaceful community can consist of two separate societies viewing each other with mistrust and suspicion from ever higher walls of separation. Education has been historically in our country and remains to this day, one of the primary means of overcoming barriers of class, status and occupation.

A court can only enjoin upon a school board its legal duty. It cannot reach the infinitely more sensitive moral obligation that defies legal measurement. We commend to the School Board of the City of Dayton its moral obligation to provide the highest possible level of education equally for all children entrusted to its care, without distinction or bias or partiality.

/s/ CARL B. RUBIN
United States District Judge

APPENDIX A, FEBRUARY 7, 1973 FINDINGS OF FACT RACIAL COMPOSITION OF DAYTON PUBLIC SCHOOLS (1971-1972)

Elementary schools — % Black:

1. Jane Addams	81.7	27. Jackson Primary	98.8
2. Allen	0.6	28. Jefferson Ele.	60.1
3. Belle Haven	5.0	29. Jefferson Primary	57.1
4. Belmont	0.0	30. Kemp	**0.0**
5. Brown	0.6	31. Lewton	0.0
6. Carlson	99.0	32. Lincoln	0.0
7. Cleveland	0.0	33. Loos	4.6
8. Drexel	5.7	34. Horace Mann	0.2
9. Eastmont	0.0	35. McGuffey	14.4
10. Edison	97.3	36. McNary Park	99.4
11. Emerson	6.8	37. Meadowdale Ele.	8.0
12. Fairport	0.1	38. Miami Chapel	99.9
13. Fairview Elementary	1.7	39. Patterson-Kennedy	0.0
		40. Residence Park Ele.	98.8
14. Ft. McKinley	0.0	41. Residence Park Pri.	99.3
15. Franklin	0.0	42. Ruskin	7.0
16. Gardendale	28.5	43. Shiloh	0.1
17. Gettysburg	5.2	44. Shoup Mill	7.1
18. Gorman	21.1	45. Louise Troy	100.0
19. U.S. Grant	0.1	46. Valerie	7.5
20. Grace A. Greene	96.8	47. Van Cleve	1.1
21. Hawthorne	0.0	48. Washington	19.4
22. Hickorydale	6.6	49. Weaver	99.9
23. Highview	97.0	50. Webster	0.0
24. Huffman	0.0	51. Westwood	99.4
25. Irving	99.0	52. Wogaman	100.0
26. Jackson Elementary	99.1		

Of 52 elementary schools in use as of September, 1972, 29 are more than 90% white and 15 are more than 90% black. The balance range from 19.4% to 60.1% black.

Middle schools – % Black:

1. MacFarlane 99.6
2. Whittier 99.3
3. Cornell Heights 80.5
4. Longfellow 64.1
5. Orville Wright 8.1

High Schools – % Black:

1. Dunbar 100.0
2. Roosevelt 100.0
3. Roth 95.8
4. Colonel White 54.6
5. Patterson Co-op 32 9
6. Fairview 24.1
7. Stivers 14.0
8. Meadowdale 10.6
9. Kiser 9.8
10. Wilbur Wright 9.2
11. Belmont 5.2

APPENDIX B TO FEBRUARY 7, 1973 FINDINGS OF FACT
EXISTING OPTIONAL ZONES

Optional Zone	Date of Creation	Percentage Black School Population At date of creation	1972-73
Elementary schools:			
1. Belle Haven/	1955	0.0	17.7
Fort McKinley		0.0	2.6
2. Residence Park/	1954	a.	100
Jane Addams		29.3 b.	78.7
3. Westwood Ele./	1952	0.0	99.7
Jackson Ele.		35.9	99.9
4. Lincoln/	1957	0.0	0.6
HoraceMann		0.0	3.1
5. Cleveland/	1956	0.0	0.8
Belmont Ele.		0.0	9.4
6. Grant/	1957 c.	0.0	0.3
Belmont		0.0	9.4
7. Eastmont	1957 c.	0.0	0.7
Lewton		0.0	5.8
High schools:			
1. Fairview/	1965	0.9 c.	24.1
Roth		53.5 c.	95.8
2. Roosevelt/	1951	31.5	100.0
Colonel White	extended 1958	0.0	54.6
3. Kiser/	1962	2.7 c.	9.8
Colonel White		1.1 c.	54.6
4. Wilbur Wright/	1956	2.2 b.	9.2
Belmont High		0.0	5.2

a. Figures not available
b. Figures as of 1951
c. Figures as of 1963-1964

APPENDIX C TO FEBRUARY 7, 1973 FINDINGS OF FACT FREEDOM OF ENROLLMENT APPLICATIONS

	1969-70 1970-71	1971-72	1972-73
White applications	133	78	47
Black applications	695	757	741
Totals	828	835	788
White approvals	50	39	23
Black approvals	421	460	460
Totals	471	499	483
White disapprovals	83	76	15
Black disapprovals	274	260	187
Totals	357	336	202
White disapprovals (Lack of classroom space)	16	8	12
Black disapprovals (Lack of classroom space)	164	174	166
Total disapprovals (Lack of classroom space)	180	182	178

APPENDIX D TO FEBRUARY 7, 1973 FINDINGS OF FACT RESOLUTIONS OF THE DAYTON SCHOOL BOARD

At the December 8, 1971, meeting of the Dayton School Board, the following three resolutions were passed, each by a 5-2 vote:

RESOLUTION SEEKING JOINT ACTION TO END SEGREGATION IN EDUCATION, HOUSING AND EMPLOYMENT IN THE METROPOLITAN DAYTON AREA

WHEREAS, the Committee of 75, in reporting to this Board, has called renewed attention to the widespread racial and economic isolation of pupils in the Dayton Public Schools and in schools of the metropolitan Dayton area.

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

1. That this Board hereby recognizes and admits that racial and economic segregation exists in the Dayton schools because of the actions and inactions of this and predecessor boards in the establishment of attendance districts, the location and expansion of school buildings, pupil assignment practices, design of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs; the past actions or inactions of the Ohio General Assembly, the State Board of Education, and other agencies of Federal, state, and local government in contributing to the development and continuation of segregated housing, education, and employment in the Dayton metropolitan area and other parts of Ohio; and the actions and inactions of lending agencies, real estate interests, employers, unions, private schools, colleges, churches, and other organizations that have reinforced segregation.

2. That this Board recognizes that past actions or inactions

of the Board of Education and residential racial segregation are interdependent phenomena.

3. That this Board recognizes that the black minority population of the Dayton metropolitan area, as illustrated by the existence of schools of opposite racial composition in districts with contiguous district lines, essentially is contained within the central city of Dayton, as a result of discriminatory practices. Such containment works against a viable integrated school system within the city, and the Board asserts that a truly effective solution is possible only through a metropolitan approach.

4. That this Board of Education recognizes that racial and economic integration of student bodies in each school is imperative to providing equal educational opportunity, a broad curriculum capable of serving the individual needs of pupils, and a democratic environment in which future citizens can be prepared to live in America's multi-ethnic society.

RESOLUTION ASKING FOR STATE ASSISTANCE TO DESEGREGATE PUBLIC SCHOOLS

WHEREAS, The Committee of 75 has recommended school integration on a metropolitan basis, and

WHEREAS, the State of Ohio has responsibility and authority for the operation of public schools, and the State Board of Education has the duty to administer the laws relating generally to the operation of the schools, and

WHEREAS, the Ohio Attorney General has ruled that the State Board of Education has the authority to restrict funding in any school district in which said Board finds as a matter of fact that racial segregation exists,

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

1. That this Board hereby petitions the State of Ohio and the State Board of Education (a) to obtain from Ohio Civil Rights Commission, U.S. Office of Education and such other sources as it may deem useful, data on racial isolation of faculty, staffs and pupils within and among the several school districts as presently constituted in the metropolitan Dayton area; (b) to develop guidelines and criteria as may be necessary to assure an educationally and socially viable mix of pupils, within the socio-economic characteristics of the metropolitan area as a whole; (c) to require said districts to cooperate in preparing and implementing a plan for assignment of faculty, staffs and pupils in accordance with said guidelines and criteria, and (d) to assure adequate funding from state and district sources to continue the operation of the schools and the implementation of said plans throughout the period of transition and thereafter.

2. That said plans be developed by September 1, 1972 and fully implemented not later than September 1, 1973.

3. That the Clerk of the Board forward a true copy of this resolution to the Governor of the State of Ohio, the Speaker of the House of Representatives, the President of the Ohio Senate and the President of the State Board of Education.

• • •

RESOLUTION ORDERING THE RACIAL AND ECONOMIC INTEGRATION OF PUPILS IN THE DAYTON PUBLIC SCHOOLS

WHEREAS, the Board of Education of the Dayton City School District recognizes a moral and legal duty to provide quality non-segregated education for all students in the district, and,

WHEREAS, integrated education is vital to the achievement

of quality education for all pupils, black and white, rich and poor, and,

5. That this Board view the racial and ethnic mix of the Dayton City School District and of the metropolitan area as assets; that this population, if reflected in each school, could itself contribute to people's learning from each other; and that as a whole, the metropolitan area represents a nearly ideal cross section of the nation that could permit schools here to become a model of American democracy in action.

6. That this Board hereby invites and urges agencies of the federal, state, and local governments and organizations of religious, business, labor, education, communications, civic service, and real estate to assist the Board in desegregation of Dayton schools and to pledge publicly their accelerated efforts to bring about desegregation in housing, education and employment throughout the Dayton metropolitan area.

7. That the Clerk of The Board be and hereby is directed to forward a true copy of this resolution to the following:
   Governor of the State of Ohio
   President of the State Board of Education
   Speaker of the Ohio House of Representatives
   President of the Ohio Senate
   Montgomery County Members of the Ohio General Assembly and United States Congress.
   Montgomery County Commissioners
   Dayton City Commissioners
   Montgomery County Council of Governments
   City Plan Board
   Miami Valley Regional Planning Commission
   Miami Valley Regional Transit Authority
   Metropolitan Housing Authority
   Apartment Owners Associations
   Area Progress Council

Assembly of Area Councils
Chairmen of Democratic and Republican Organizations
Community Affairs Committee
Congress of Representative East Dayton Organizations
Dayton Advisory Council on Education
Dayton Area Board of Realtors
Dayton Area Chamber of Commerce
Dayton Area Junior Chamber of Commerce
Dayton Building Trades Council
Dayton Classroom Teachers Association
Dayton-Miami Valley AFL-CIO
Dayton Model Cities Planning Council, Inc.
Dayton Public Service Union
Dayton Urban League
Deans of Area Colleges of Education
Elementary Principals Association
Metropolitan Churches United
Miami Valley Consortium of Colleges and Universities
Montgomery County Community Action Agency
Montgomery County Council of PTAs
National Association for the Advancement of Colored People
Ohio Association of Public School Employees
Presidents Club
Secondary Principals Association
Southern Christian Leadership Conference

WHEREAS, the Fourteenth amendment to the United States Constitution and the mandate of the United States Supreme Court in Brown v. Board of Education decision and subsequent court decisions place an affirmative duty to dis-establish the segregated attendance patterns which result in whole or in part from its actions and inactions in order to equalize educational opportunity, and,

WHEREAS, segregated educational opportunity and unequal educational opportunities for minority and poor students now exist in the Dayton public schools, and,

WHEREAS, this inequality exists as a result of the acts and omissions of the Board and preceding Boards in their decisions concerning the site selection of school buildings, size of school buildings, changes and adoption of school attendance boundaries, pupil assignment practices, faculty and staff hiring and assignment practices and,

WHEREAS, this Board has requested and received reports of findings and recommendations from the State Department of Education and the Committee of 75,

NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton that it is the policy of this Board that each school shall enroll pupils in a manner which substantially reflects the racial and economic characteristics of the district as a whole. The Board recognizes that implementation of this policy requires departure from past practices and requires special planning to assure a smooth transition. The Board therefore directs:

1. That the superintendent in consultation with professional staff and the representatives of employee organizations, design and implement a mandatory program of in-service education involving all staff members to prepare staff for changes in enrollments and to develop an individualized, multi-ethnic curriculum in each school.

2. That Dayton Advisory Council on Education be requested to organize a Community Involvement Advisory Committee and a Lay Citizens Financial Review Committee to advise the superintendant during the course of planning and implementing integration programs, as recommended by the Committee of 75.

3. That the superintendent be and hereby is directed to develop and implement plans for the racial and economic integration of pupils using the following guidelines and criteria:

a. Attendance districts as presently constituted are rescinded effective September 1, 1972.

b. No building shall have a racial composition and family income characteristics substantially disproportionate to the district as a whole.

c. After determination of building capacities and racial and economic characteristics of attendance areas, pupils will be assigned to a school in which such assignment would contribute to a mix as in b. above.

d. Freedom of Enrollment policy with the exception of transfers for course enrollment shall be eliminated by September 1, 1972.

e. Desegregation is to be completed by September, 1972.

f. Nothing herein shall be construed to limit the establishment of magnet, demonstration, specialized or other education complexes, provided that the sites for instruction meet the criterial in c. above.

g. Transportation shall be held to a minimum, but is specifically included as one means of implementing this policy.

4. That to the maximum feasible extent consistent with this policy statement, recommendations of the Committee of 75, are hereby adopted and may be used in planning and implementing school integration.

5. That the superintendent report on progress and problems concerning implementation of this policy at least every sixty days and that a program for continuous evaluation throughout the phases of implementation be developed by July 31, 1972.

6. That the superintendent prepare applications for supplementary financial assistance from state, federal and other sources that may become available to improve the quality of education and achieve the goals of the Committee of 75 report.

B. DISTRICT COURT'S JULY 13, 1973 SUPPLEMENTAL OPINION ON REMEDY.

(Filed July 13, 1973)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil No. 72-137

MARK BRINKMAN, et al,

Plaintiffs

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al,

Defendants

SUPPLEMENTAL ORDER ON REMEDY

Pursuant to order of this Court dated February 7, 1973, the defendant School Board of the City of Dayton has submitted a desegregation plan for consideration. A separate plan has been submitted by the minority members of the Dayton School Board, as has one by the Dayton Classroom Teachers' Association, whose motion to file as amicus curiae in this matter is hereby GRANTED. Exhaustive memoranda have likewise been filed by interested parties. The matter is now before the court for determination.

The plan submitted by the defendant Board contains eleven points: Four are directed to the specific requirements imposed by this Court and seven are in response to the Court's sugges-

tion that additional action be undertaken. Such additional action was not specifically mandated by the Court. We do, however, note our disappointment at the limited nature of Points V through XI. While defendant School Board can assert that it was not required by the Court to go as far as it has, a response can be made with equal accuracy that the community relies on the elected members of the School Board to approach the present problem in a sensitive and understanding fashion. The Board's proposals, unfortunately, do not convince us that they have completely attained this desired goal.

We turn to the four points of the plan required by the Court's order. Point I eliminates the optional zones and their attendant segregatory effects. Point III provides for non-racially based faculty assignment practices. Point IV provides for the proper hiring policies of classified personnel. Points I, III and IV are in accord with the requirements of the Court's previous order and as to them, the plan of defendant School Board of the City of Dayton is hereby APPROVED.

Point II, however, which deals with Freedom of Enrollment Priorities, does not entirely meet the required standards. It will be conditionally accepted for elementary schools and middle schools for the school year 1973-74. It will not be accepted for the high schools.

As to the Dayton high schools, the Board is hereby directed to achieve the following:

(1) Any student eligible to attend a Dayton public high school may attend any high school within the Dayton Public School district, provided that students presently enrolled in high schools shall have first priority to complete their education therein.

(2) Each incoming ninth grade class and all vacancies in the tenth, eleventh and twelfth grade classes shall be filed from those pupils seeking admission. Where there is insufficient capacity for all pupils seeking admission, a random selection plan shall be used.

(3) Only insufficient capacity shall be deemed reason to exclude any applying pupil.

(4) Transportation shall be the responsibility of the Board of Education for all students eligible and approved for transfer outside of the attendance area of such students' residences.

The defendant Board of Education will submit to this Court within thirty (30) days of the date of this Order a revised plan to comply with the above. Included in such plan will be a listing of the pupil capacity by grade of each of the high schools within the Dayton Public School District. Plaintiffs will be granted an opportunity to present evidence as to such capacity. The foregoing admission plan shall not apply to the Patterson-Stivers Vocational High School.

There remain for consideration two further questions which the Court has reserved: The matter of the so-called Metropolitan School District and the status of defendants State of Ohio through its Governor and the Ohio Department of Education.

The findings by the Court in its Order of February 7, 1973, and the disposition of the Board of Education's plan appear to moot the metropolitan question and to require the dismissal of these non-Dayton defendants. Plaintiffs are hereby granted thirty (30) days within which to file memoranda on either or both of these questions. Defendants are granted thirty (30) days from the date of such filing to file answer memoranda and plaintiffs are granted thirty (30) days from defendants' filing to file reply memoranda. An evidentiary hearing will be granted upon either of such questions upon the showing of a need therefor.

This supplemental Order has been delayed pending study of the decision of the Supreme Court of the United States in *Keyes* v. *School District No. 1, Denver, Colorado,* —— U.S. ——, 42 U.S.L.W. 5002 (June 21, 1973). The *Keyes* case dealt, for the first time, with a large northern city whose school

system had never been operated under mandatory segregation laws, but which had nevertheless acted in a way that helped create a racially segregative system. It is significant both as a major landmark in the continuing definition of the Equal Protection clause within the context of school desegregation that began with *Brown* v. *Board of Education,* 347 U.S. 483 (1954); and as an indication of the views and attitude of the present Supreme Court. It will of necessity have a major impact upon the future direction of the public school systems in the United States including the one in Dayton, Ohio.

The concurring opinion of Justice Powell must rank among the clearest and most logical expositions of a most troubling and difficult subject. This court proposes to follow the rationale set forth by Justice Powell. We place the burden upon the Board to comply to the fullest extent possible with the views stated therein. We place particular significance on the following statement of Justice Powell:

> "The Term, "integrated school system,' presupposes, of course, a total absence of any laws, regulations or policies supportive of the type of 'legalized' segregation condemned in *Brown.*
>
> "A system would be integrated in accord with constitutional standards if the responsible authorities had taken appropriate steps to: (i) integrate faculties and administration; (ii) scrupulously assure equality of facilities, instructions and curricula opportunities throughout the district; (iii) utilize their authority to draw attendance zones to promote integration; and (iv) locate new schools, close to old ones, and determine the size and grade categories with the same objective in mind. Where school authorities decide to undertake the transportation of students, this also must be with integrative opportunities in mind."

This Court likewise adopts as its guiding definition the following statement from Justice Powell:

> "An integrated school system does not mean, and indeed could not mean, in view of the residential patterns of most of our major metropo'itan areas, that *every school* must in fact be an integrated unit. A school which happens to be all or predominately white or all or predominately black is not a 'segregated' school in an unconstitutional sense if the system itself is a genuinely integrated one."

Keyes v. *School District No. 1, Denver, supra,* 41 U.S.L.W. at 5012.

Relating the standards established by Justice Powell to the Dayton situation, the Court has found that appropriate steps to integrate faculties and administration have been instituted and will be continued. There has been and there will be an increasing level of transportation of students for the purpose of promoting integrative opportunities through the Freedom of Enrollment priorities.

There is presently no evidence of a failure of equality of facilities, instructions and curricula opportunities nor has there been a persuasive proof that the Board, in recent times, drew attendance lines or built new facilities for the avowed purpose of minimizing integration. However, there has been evidence which indicates that the affirmative promotion of integration through these essential functions of the Board has not held an important place in the Board's priorities.

The Powell rationale will operate prospectively. The Board's planning and implementation units must become capable of and sensitive to the racial effects which flow from the drawing of attendance lines, the construction and improvement of school facilities and the assignment of faculty, staff and pupils. All of such actions must henceforth be examined for their "integration impact."

These are long range goals and a further opportunity should be given to the Dayton School Board in which to plan and implement them. Accordingly, while this Court is most reluctant to continue a "federal receivership" of the Dayton School System, see *Keyes* v. *School District No. 1, Denver, supra,* 41 U.S.L.W. 5022 (Rehnquist, J. dissenting), it would seem that a proper disposition of this problem requires a retention of jurisdiction while a reasonable period of time is given to the School Board for this purpose. Therefore, as to these long-range criteria, the Court will re-examine the Dayton School System at the end of academic year 1973-74 and determine, at that time, whether or not additional judicial action is required.

Nothing that we have said today should be interpreted as a repudiation of the neighborhood school concept. To the contrary, it is this concept which often represents the bedrock strength of the public school systems and steps may be properly taken to preserve it. See *Keyes* v. *School District No. 1, Denver, supra,* 41 U.S.L.W. 5018-5020 (Powell, J., concurring in part and dissenting in part); *Deal* v. *Cincinnati Board of Education,* 396 F.2d 55, 60 (C.A.6 1966). Where school lines in Dayton have been drawn without improper racial intent, they will be allowed to stand. Where they have not yet been drawn, as in the case of the still embryonic system of middle schools, they should be drawn in such a way as to maximize integrative goals.

The essential principle which guides this Court is a paraphrase from *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 at pages 15-16.

It is the function of the federal courts only to eliminate a deprivation of constitutional rights; it is the duty of local school boards to operate and maintain integrated school systems.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
United States District Judge

C. COURT OF APPEALS' AUGUST 20, 1974 OPINION.

(Filed August 20, 1974)

Nos. 73-1974-75

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARK BRINKMAN, ET AL., *Plaintiffs-Appellants,* v. JOHN J. GILLIGAN, ET AL., *Defendants-Appellees.*	APPEAL from the United States District Court for the Southern District of Ohio, Eastern Division.
MARK BRINKMAN, ET AL., *Plaintiffs-Appellees,* v. DAYTON BOARD OF EDUCATION, *Defendants-Appellants.*	

Before PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

PHILLIPS, Chief Judge. This is a school desegregation case directed against the public school system of Dayton, Ohio. For the reasons set forth below, we affirm in part and remand the case to the District Court for further proceedings.

Plaintiffs-appellants are black and white Dayton parents who bring this class action on their own behalf, on behalf of their minor children, and on behalf of all others similarly situated.

In addition, the National Association for the Advancement of Colored People (NAACP) joined as a party plaintiff. The complaint named the Governor of Ohio, the Attorney General of Ohio, the Ohio State Board of Education, the Superintendent of Public Instruction of the Ohio Department of Education, the Dayton Board of Education, the six individual members of the Dayton Board and the Superintendent of the Dayton School District as parties defendants.[1] The Dayton Board of Education has cross appealed.

I. Chronology of Proceedings

In their complaint filed on April 17, 1972, appellants sought, *inter alia,* an injunction enjoining the Dayton defendants from continuing their allegedly unconstitutional policy of operating the public schools in Dayton in a manner that perpetuated racial segregation. The complaint further averred numerous racially discriminatory practices for which the State defendants had allocated educational resources.

The complaint was filed in the United States District Court for the Southern District of Ohio, Eastern Division, which is located at Columbus, Ohio, rather than in the Western Division at Dayton (the situs of the subject schools) on the basis that the State defendants were domiciled in Franklin County (Columbus). Motions to dismiss for failure to join necesary parties and for improper venue and alternative motions to transfer the action to the District Court at Dayton were filed by the State defendants, the Dayton Board of Education and three individual Dayton Board members. On June 22, 1972, the District Court overruled the motions to dismiss for improper venue and denied the motions to transfer, but did not

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[1] Hereinafter, the Governor, Attorney General, State Board of Education, and the Superintendent of Public Instruction will sometimes be referred to collectively as the "State defendants." Hereinafter, the Dayton Board of Education, its members, and its Superintendent sometimes will be referred to collectively as the "Dayton defendants."

rule on the motion to dismiss for want of necessary parties. Thereafter, on July 24, 1972, the Dayton defendants and the State defendants filed their answers denying the material allegations of the plaintiffs' complaint.

In accordance with the proposed order of procedure, an expedited hearing before District Judge Carl B. Rubin, was conducted from November 13 through December 1, 1972, limited to the single issue of whether the school system of Dayton was a segregated one by reason of acts of the Dayton Board of Education. On February 7, 1973, the District Court filed its Findings of Fact and Memorandum Opinion of Law in which it found that (1) racially imbalanced schools, (2) optional attendance zones, and (3) rescission by the Dayton Board of Education of three resolutions calling for racial and economic ba'ance in each school in the Dayton system were "cumulatively in violation of the Equal Protection Clause" of the Constitution. In its February 7, 1973, decision, the District Court ordered the Dayton Board to submit a plan which would (1) abolish all optional zones, (2) restate the priorities of the Board's Freedom of Enrollment program so that racial transfers would take precedence over curriculum transfers, (3) maintain faculty assignment practices so that each school would continue to reflect the approximate ratio of the total b'ack to white faculty in the Dayton system, and (4) establish hiring practices that would enable the clerical and maintenance personnel employed by the Board to approximate the proportion of black-to-white population existing within the Dayton system. The District Court further stated that the foregoing elements "shall be considered as a minimum" and that the plan to be submitted by the Board should otherwise conform in all respects to the requirements of law, citing *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) and *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971).

In compliance with the February 7, 1973, order of the District Court, the Dayton Board on March 19, 1973, submitted

a desegregation plan to the District Court. This plan contained eleven points which are summarized below:

I. Elimination of Optional Zones – eliminated optional attendance zones for elementary and high school students.

II. Freedom of Enrollment Priorities – revised the system's Freedom of Enrollment program in accordance with a specified set of priorities.

III. Faculty Assignment Practices – provided that faculty assignments for each school in the system should reflect the ratio of white to black faculty in the entire system.

IV. Hiring Policies for Classified Personnel – provided that blacks would be hired for classified positions, e.g. clerical, custodial and food service staff, to reflect the proportion of the black-to-white population residing within the Dayton School District.

V. Science Environmental Program – proposed the establishment of a city-wide elementary science program guided by a trained staff working at four centers. The program was to be mandatory and children were to be bused to produce a racial mix that approximates the ratio between black and white students in the system as a whole.

VI. Patterson-Stivers Vocational High School – combined two existing vocational schools into a new unified cooperative school with a district-wide attendance area.

VII. The Musical Stereopticon – formed an elementary and high school band orchestra and chorus on an all-city basis.

VIII. Integrated Athletics – required schools that have no minorities on their teams to schedule schools that do have minorities represented. High school schedules were to be administered by a central athletic office to insure that racial isolation did not exist.

IX. Minority Language Program — required all classroom teachers and administrators at the elementary school level to participate in a series of in-service workshops on linguistic differences that exist in American English.

X. Living Arts Center — created departments in art, creative writing, dance and drama to permit studets, teachers, and parents to expand their knowledge in these areas.

XI. Control Centers — created rumor control centers, school guidance centers, and area learning centers to create a more secure climate for quality education in the school system.

In addition to the plan submitted by the Dayton Board, separate plans were submitted to the District Court by the minority members of the Dayton Board and the Dayton Classroom Teachers' Association. The Board minority submitted its more comprehensive plan because it believed that the plan of the Board majority would maintain the status quo and hence did not comply with the February 7, 1973, order of the District Court to conform in all respects with *Swann, supra,* and *Davis supra.* Further, the plaintiffs-appellants filed objections to the plan of the Board majority primarily on the grounds that the majority plan "froze in" the present unconstitutional system of segregation and would fail to eliminate racialy identifiable schools when other alternative remedies, such as busing of children to other schools, were available.

On July 13, 1973, after considering the three desegregation plans before it, the District Court issued its Supplemental Order on Remedy. The District Court essentialy accepted the plan of the Board majority except that the Dayton Board was ordered to submit a freedom of choice plan for the Dayton high schools. The District Court, however, expressed its "disappointment at the limited nature of Points V through XI"

of the plan of the Board majority, and stated that the desired goal was not attained completely by the majority plan.

The District Court then stated:

> 'There remain for consideration two further questions which the Court has reserved: The matter of the so-called Metropolitan School District and the status of defendants State of Ohio through its Governor and the Ohio Department of Education.
>
> "The findings by the Court in its Order of February 7, 1973, and the disposition of the Board of Education's plan appear to moot the metropolitan question and to require the dismissal of these non-Dayton defendants. Plaintiffs are hereby granted thirty (30) days within which to file memoranda on either or both of these questions. Defendants are granted thirty (30) days from the date of such filing to file answer memoranda and plainiffs are granted thirty (30) days from defendants' filing to file reply memoranda. An evidentiary hearing will be granted upon either of such questions upon the showing of a need therefor."

The District Court concluded its July 13, 1973, order as follows:

> "Nothing that we have said today should be interpreted as a repudiation of the neighborhood school concept. To the contrary, it is this concept which often represents the bedrock strength of public school systems and steps may be properly taken to preserve it. See *Keyes* v. *School District No. 1, Denver, supra,* 41 U.S.L.W. 5013-5020 (Powell, J., concurring in part and dissenting in part); *Deal* v. *Cincinnati Board of Education,* 396 F.2d 55, 60 (C. A. 6 1966). Where school lines in Dayton have been drawn without improper racial intent, they will be allowed to stand. Where they have not yet been drawn, as in the case of the still embryonic system of middle schools, they should be drawn in such a way as to maximize integrative goals.

"The essential principle which guides this Court is a paraphrase from *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 at pages 15-16.

"It is the function of the federal courts only to eliminate a deprivation of constitutional rights; it is the duty of local school boards to operate and maintain integrated schools systems."

Following the July 13, 1973, order of the District Court, the plaintiffs-appellants in a letter dated July 26, 1973, reminded the District Court that by its own order of procedure evidence with respect to the metropolitan and state aspects of the controversy had been excluded from the earlier hearing. On August 10, 1973, the Dayton Board submitted a revised plan incorporating the court's freedom of choice plan for the Dayton high schools. The plaintiffs-appellants filed their notice of appeal from the two orders of the District Court on July 23, 1973. The Dayton Board cross appealed from those orders on August 13, 1973.

Thereafter, on September 25, 1973, the Dayton Board moved this court to dismiss the pending appeal of the plaintiffs-appellants for want of jurisdiction on the ground that no final order had been entered by the District Court. In an unreported order filed on January 17, 1974, this court denied the Dayton Board's motion to dismiss, saying:

"Said motion to dismiss is hereby denied, it appearing to the court that the District Judge's supplemental order on remedy, dated July 13, 1973, approves a proposed desegregation plan with added instruction as to how it is to be carried into effect, and hence, appears to be in the nature of a temporary injunction under 28 U.S.C. § 1292(a)(1) (1970)."

We have heard oral arguments and the case is now before the court for decision.

II. Historical Background of School Segregation in Dayton

Ohio law has long mandated an integrated public school system. Ohio Revised Code, § 3313.48, provides in relevant part:

"The board of education, of each city, exempted village, local, and joint vocational school district shall provide for the free education of the youth of school age within the district under its jurisdiction, at such places as will be most convenient for the attendance of the largest number thereof."

This has been the law of Ohio since February 22, 1887, when it was enacted by 84 Ohio Laws 34. That statute was upheld by the Supreme Court of Ohio in 1888 in *Board of Education* v. *State,* 45 Ohio St. 555, 556, 16 N.E. 373, in which the court stated:

"[S]ection 4008 having been repealed by the act of the general assembly passed February 22, 1887 (84 Ohio L. 34), separate schools for colored children have been abolished and no regulation can be made under section 4013, that does not apply to all children irrespective of race or color."

Further, the District Court made the following historical determination, that is not challenged on appeal, as a finding of fact:

"(1) The evidence presented has established isolated but repeated instances of failure by the Dayton School Board to meet the standards of the Ohio law mandating an integrated school system. Such instances include a physical segregation into separate buildings of pupils and teachers by race at the Garfield School in the early 1920's, a denial to blacks of access to swimming pools in high schools in the 1930's and 1940's and the exclusion, between 1938 and 1948, of black high school teams from the city athletic conference." (Footnotes omitted.)

The physical segregation into separate buildings of pupils and teachers by race was ruled illegal in *Board of Education of School District of City of Dayton v. State, ex rel. Reese*, 114 Ohio St. 188, 189, 151 N.E. 39 (1926).

In 1956, following *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the Ohio Attorney General ruled that the Ohio State Board of Education had the primary responsibility for administering the laws relating to the distribution of state and federal funds to local school districts and that such funds should not be distributed, absent good and sufficient reasons, by the State Board to local school districts which segregated pupils on the basis of race in violation of *Brown*. Despite protests over the past twenty years from the Dayton branch of the NAACP and others, the Dayton Board has maintained a system wherein the great majority of schools today have student populations which are racially imbalanced. The State Board of Education has permitted this system to continue with a steady flow of state and federal money.

On March 17, 1969, the Acting Director of the Office for Civil Rights, United States Department of Health, Education and Welfare (HEW), notified the Dayton School authorities that, as a result of a compliance review conducted by federal officials, his office had concluded that the Dayton school district was not complying with Title VI of the Civil Rights Act of 1964. In particular, the Acting Director stated:

> "An analysis of the data obtained during the review establishes that your district pursues a policy of racially motivated assignment of teachers and other professional staff. Thus, all Negro principals are assigned to predominantly Negro schools, as are 11 of the 14 Negro assistant principals; 156 out of 181 Negro high school teachers are assigned to schools where Negroes constitute 92 percent of the total enrollment. Over 85 percent of the Negro elementary teachers instruct in schools having a preponderence of Negro pupils, and only 14 percent of teachers

> of the white race are in schools where Negroes are in the majority. The assignment of counsellors and coaches follows a similar pattern.
>
> "The existence in your district of a substantial duality in terms of race or color with respect to distribution of pupils in the various schools, is a matter of concern to us. The fact appears to be that of a total of 5,627 Negro high school pupils, approximately 85 percent are concentrated in 3 high schools in which the percentage of Negro attendence ranges from 92.3 percent to 100 percent. Similarly, 15,479 (approximately 85 percent) Negro elementary pupils attend 20 out of the 53 elementary schools in your district. It is noteworthy that in 17 of these 20 schools, Negroes constitute 90-100 percent of the total enrollment.
>
> "Our review also indicates that students at Roosevelt High School are not afforded the same educational opportunity as other students in your system."

On June 7, 1971, the Ohio State Department of Education presented a series of recommendations to the Dayton Board on how to achieve constitutionally required desegregation. In its letter conveying the recommendations, a State Department of Education report stated:

> "As the resolution of April 29, 1971 (of the Dayton Board), admitted, 'the Dayton Board of Education recognizes that unequal educational opportunities for minority students now exists.' Inequality of such opportunities, for minority *and* majority students, has characterized the Dayton public school system throughout its history.
>
> "Since the Board, *as an agency of state government*, has created the inequality which offends the Constitution, the Ohio State Department of Education must advise that the Dayton Board of Education clearly has an affirmative

duty to comply with the Constitution; that is, as the Supreme Court has stated, 'to eliminate from the public schools all vestiges of state-imposed segregation.'"

In particular, the State Department report was especially critical of the process of conversion to feeder and middle schools, stating that the following seemed to be occurring:

"1. two sets of schools will be totally black;

"2. racial isolation will actually be increased in one set of schools; and

"3. only in the Dayton View area, which was previously integrated, could conversion to middle schools possibly result in reduction of racial and economic isolation and insulation.

"If what appears to be happening with middle schools is in fact happening, then Dayton has only added one more action to a long list of state-imposed activities which are offensive to the Constitution and which are degrading to schoolchildren. Along with many other affirmative duties which the Dayton Board must fulfill, correction of this particular offense must occur."

Although the recommendations of the State Department were not complied with in full, the State Board of Education continued to aid in financing the operation of Dayton schools.

Finally, pursuant to the resolution of the Dayton Board passed at its April 29, 1971, meeting, the President of the Dayton Board appointed a broadly representative committee to evaluate and advise the Board on plans to reduce racial isolation and improve educational opportunities in Dayton. This committee became known as the Committee of 75, although its membership was later expanded to include eleven students. At its first meeting, on August 30, 1971, the Committee was charged as follows by the Board President:

"We recognize, and the statistical data substantiates, the fact that unequal educational opportunities for the poor and black students now exist in the Dayton School District. The Board of Education has gone on record by setting quality integrated education as its goal. We have admitted that the district is guilty of procedures which have led to the racial isolation of school children.

"It is this committee's responsibility to establish the evaluation elements to be applied to a developed plan or plans and advise the Dayton Board of Education accordingly. We do hope that you would set up guidelines and/or methods by which the community will become meaningfully involved.

"You are an arm of the Dayton Board of Education with the task of supplying input to the Board. It remains the responsibility of the Board of Education to make official approval of your point. We feel very strongly that the establishment of this committee is not an attempt to abdicate its responsibility or delegate its authority, but rather an attempt to utilize the enrichment of citizen participation. It is hoped that the school councils, and organized groups of school-oriented citizens of the school district, will be an avenue you may use for additional participation.

"If there be a fear that you are here to architect a master plan for 'busing' — 't'ain't true.' You are here in an attemp to supply your input of the ingredients for excellency to any plan that the administration and/or consultants may recommend. It is our sincere hope that when a plan is set for implementation, it should be that one or the one that embraces the wishes of the citizens of the Dayton School District and not one imposed by federal, state or court mandate."

After several months of study, the Committee of 75 issued its report in the late fall of 1971. The report recognized the

Dayton Board's casual responsibility for the condition of segregation and the imperative need to end one race schooling, and suggested the following tentative approaches to accomplish desegregation in the Dayton school system:

"1. Segregated education, because it perpetuates and condones economic and racial isolation, is both illegal and inferior.

"2. The school children of Dayton have suffered far too long under the crippling handicaps imposed by racial and economic isolation.

"3. We must resolve now as a total community to end inferior segregated education once and for all.

"4. Time is running out. Unless we act now the divisions generated by segregation will destroy us. Unless we act now court orders may impose upon us what all of us will regret.

"5. Initiative in the struggle against segregated education belongs to the Dayton Board of Education. We cannot wait for housing and job patterns to change while we defy the law of the land.

"6. To lift the plague of segregated education in Dayton immediate appeal must be addressed to the school systems surrounding Dayton as well as to the appropriate state and national agencies involved.

"7. Desegregation is not enough. To end racial and economic isolation we must not rest until we have achieved true integration, until the differing ethnic and racial groups among us are able to live side by side in mutual respect.

"8. The personal cost of achieving such true integration will be high because to achieve such integration we must persist in dialogue until the differences that divide us have been resolved. We can no longer allow the fear of busing (to) stifle such dialogue.

"9. The financial cost of true integration will also be high. At least 1 per cent of the current budget, exclusive of federal and state grants, should be allocated to this sector.

"10. Integrated quality education requires constant vigilance. We must not only develop support systems to undergird every group involved in the changes proposed but we must nurture these groups by continuing attention to curricula, buildings, and in-service training."

The report of the Committee of 75 concluded as follows:

"*Summary.* The presence and magnitude of the problem before us needs to be recognized by all the citizens of Dayton. Quality integrated education can help stop the flight to the suburbs, break the cycle of poor education, and the lack of job skills which handicap the minorities. The cost of this type of education will be small in relation to the total benefits society will reap."

Thereafter, at its regular meeting on December 8, 1971, the Dayton Board of Education passed three resolutions in response to the report of the Committee of 75. The first resolution provided, in part, as follows:

"WHEREAS, the Committee of 75, in reporting to this Board, has called renewed attention to the widespread racial and economic isolation of pupils in the Dayton Public Schools and in schools of the metropolitan Dayton area.

"NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the City School District of Dayton:

"1. That this Board hereby recognizes and admits that racial and economic segregation exists in the Dayton schools because of the actions and inactions of this and predecessor boards in the establishment of attendance districts, the location and expansion of school buildings, pupil assignment practices, design

of curriculum suitable to urban needs, the assignment of teachers and other staff, and the conduct of student activity programs; the past actions or inactions of the Ohio General Assembly, the State Board of Education, and other agencies of Federal, state, and local government in contributing to the development and continuation of segregated housing, education, and employment in the Dayton metropolitan area and other parts of Ohio; and the actions or inactions of lending agencies, real estate interests, employers, unions, private schools, colleges, churches, and other organizations that have reinforced segregation.

"2. That this Board recognizes that past actions or inactions of the Board of Education and residential racial segregation are interdependent phenomena.

"3. That this Board recognizes that the black minority population of the Dayton metropolitan area, as illustrated by the existence of schools of opposite racial composition in districts with contiguous district lines, essentially is contained within the central city of Dayton, as a result of discriminatory practices. Such containment works against a viable integrated school system within the city, and the Board asserts that a truly effective solution is possible only through a metropolitan approach.

"4. That this Board of Education recognizes that racial and economic integration of student bodies in each school is imperative to providing equal educational opportunity, a broad curriculum capable of serving the individual needs of pupils, and a democratic environment in which future citizens can be prepared to live in America's multi-ethnic society."

The second resolution passed by the Dayton Board at its December 8, 1971, meeting requested the assistance of the state and federal governments in desegregating Dayton public schools. The third resolution declared the Board policy to be that each school in the system should enroll pupils in a manner

which substantially reflected the racial and economic characteristics of the district as a whole and directed the school superintendent to implement a plan of desegregation according to the following guidelines:

"a. Attendance districts as presently constituted are rescinded effective September 1, 1972.

"b. No building shall have a racial composition and family income characteristics substantially disproportionate to the district as a whole.

"c. After determination of building capacities and racial and economic characteristics of attendance areas, pupils will be assigned to a school in which such assignment would contribute to a mix as in b. above.

"d. Freedom of Enrollment policy with the exception of transfers for course enrollment shall be eliminated by September 1, 1972.

"e. Desegregation is to be completed by September, 1972.

"f. Nothing herein shall be construed to limit the establishment of magnet, demonstration, specialized or other education complexes, provided that the sites for instruction meet the criteria in c. above.

"g. Transportation shall be held to a minimum, but is specifically included as one means of implementing this policy."

Each of the three Board resolutions passed by a 5 to 2 vote after a motion to table the resolution had failed by a 4 to 3 vote.

Subsequently, on January 3, 1972, the newly constituted Dayton Board, the composition of which had been changed by the local elections of November 1971, officially rescinded the three resolutions passed by the prior Board at its December 8, 1971 meeting. The rescission of the three resolutions occurred by votes, respectively, of 4 to 3, 4 to 2, and 4 to 2. The effect of the rescissions was to reinstate the existing attendance zones and the system's Freedom of Enrollment program for

the 1972-73 school year. The present action was filed on April 17, 1972.

III. The Constitutional Violations Found by the District Court

The District Court found three constitutional violations in the Dayton school system, namely, (A) racially imbalanced schools, (B) optional attendance zones, and (C) the Dayton Board's rescission of the three resolutions. These were held by the District Court to be "cumulatively in violation of the Equal Protection Clause." Further, the District Court stated that the rescission of the resolutions "constituted an independent violation" of the constitutional rights of the black minority in Dayton.

We hold that the findings of fact on which the District Court based its conclusion of a cumulative violation are not clearly erroneous but, to the contrary, are amply supported by the evidence. Fed. R. Civ. P. 52(a). However, we do not pass upon the question at the present time as to whether the rescission of the Board resolutions in and of itself constituted an independent violation of the Constitution.

(A) Racially Imbalanced Schools

The District Judge made the following finding of fact:

> "The great majority of all schools in the Dayton system today have student populations which are racially imbalanced, consistent with the black-white population and geographical distribution thereof as shown by the 1970 census. Except at the Patterson Co-op High School, where in the past few years a concerted effort has been made to enroll more black students, no effort has been made by the school board of Dayton to balance by race the student population at any particular school." (Footnote omitted.)

With respect to this finding of fact, the District Judge appended the following chart which graphically demonstrates the racial imbalance in Dayton's sixty-eight public schools.

RACIAL COMPOSITION OF DAYTON PUBLIC SCHOOLS (1971-1972)

Elementary schools — % Black:

1.	Jane Addams	81.7	27.	Jackson Primary	98.8
2.	Allen	0.6	28.	Jefferson Ele.	60.1
3.	Belle Haven	5.0	29.	Jefferson Primary	57.1
4.	Belmont	0.8	30.	Kemp	0.0
5.	Brown	0.6	31.	Lewton	0.0
6.	Carlson	99.0	32.	Lincoln	0.0
7.	Cleveland	0.0	33.	Loos	4.6
8.	Drexel	5.7	34.	Horace Mann	0.2
9.	Eastmont	0.0	35.	McGuffey	14.4
10.	Edison	97.3	36.	McNary Park	99.4
11.	Emerson	6.8	37.	Meadowdale Ele.	8.0
12.	Fairport	0.1	38.	Miami Chapel	99.9
13.	Fairview Ele.	1.7	39.	Patterson-Kennedy	0.0
14.	Ft. McKinley	0.0	40.	Residence Park Ele.	98.8
15.	Franklin	0.0	41.	Residence Park Pri.	99.3
16.	Gardendale	28.5	42.	Ruskin	7.0
17.	Gettysburg	5.2	43.	Shiloh	0.1
18.	Gorman	21.1	44.	Shoup Mill	7.1
19.	U.S. Grant	0.1	45.	Louise Troy	100.0
20.	Grace A. Greene	96.8	46.	Valerie	7.5
21.	Hawthorne	0.0	47.	Van Cleve	1.1
22.	Hickorydale	6.6	48.	Washington	19.4
23.	Highview	97.0	49.	Weaver	99.9
24.	Huffman	0.0	50.	Webster	0.0
25.	Irving	99.0	51.	Westwood	99.4
26.	Jackson Ele.	99.1	52.	Wogaman	100.0

Of 52 elementary schools in use as of September, 1972, 29 are more than 90% white and 15 are more than 90% black. The balance range from 19.4% to 60.1% black.

Middle Schools – % Black:

1.	MacFarlane	99.6
2.	Whittier	99.3
3.	Cornell Heights ...	80.5
4.	Longfellow	64.1
5.	Orville Wright	8.1

High Schools – % Black:

1.	Dunbar	100.0
2.	Roosevelt	100.0
3.	Roth	95.8
4.	Colonel White	54.6
5.	Patterson Co-op ..	32.9
6.	Fairview	24.1
7.	Stivers	14.0
8.	Meadowdale	10.6
9.	Kiser	9.8
10.	Wilbur Wright	9.2
11.	Belmont	5.2

Enrollment data from the Dayton system reveals the substantial lack of progress that has been made over the past 23 years in integrating the Dayton school system. In 1951-52, of 47 schools, 38 had student enrollments 90 percent or more one race (4 black, 34 white). Of the 35,000 pupils in the district, 19 per cent were black. Yet over half of all black pupils were enrolled in the four *all* black schools; and 77.6 per cent of all pupils were assigned to virtual one race schools. "Virtual one race schools" refers to schools with student enrollments 90 per cent or more one race. In 1963-64, of 64 schools, 57 had student enrollments 90 per cent or more one race (13 black, 44 white). Of the 57,400 pupils in the district, 27.8 per cent were black. Yet 79.2 per cent of all black pupils were enrolled in the 13 black schools; and 88.8 per cent of all pupils were enrolled in such one race schools.

In 1971-72 (the year the complaint was filed), of 69 schools, 49 had student enrollments 90 per cent or more one race (21 black, 28 white). Of the 54,000 pupils, 42.7 per cent were black; and 75.9 per cent of all black students were assigned to the 21 black schools. In 1972-73 (the year the hearing was held) of 68 schools, 47 were virtually one race (22 black, 25 white); fully 80 per cent of all classrooms were virtually one race. (Of the 50,000 pupils in the district, 44.6 per cent were black).

Every school which was 90 per cent or more black in 1951-52 *or* 1963-64 *or* 1971-72 and which is still in use today remains 90 per cent or more black. Of the 25 white schools in 1972-73, *all* opened 90 per cent or more white and, if open, were 90 per cent or more white in 1971-72, 1963-64 and 1951-52.

(B) Optional Attendance Zones

The District Judge made the following finding of fact:

"(11) The Board of Education of the Dayton School District has from time to time created optional zones. Optional zones are dual or overlapping attendance areas which allow children residing within them a choice among two or more schools. Some optional attendance zones were created where the more distant school geographically had better access; some were created where the more distant school did not require the crossing of busy intersections, commercial areas, or railroad tracks. Many were created for the convenience of parents. There has been evidence that at times this last concept embraced desires motivated by racial considerations. Seven optional elementary zones and four optional high school zones exist at the present time. All of the others have been abolished.

"The majority of optional zones had no racial significance at the time of their creation. The Westwood-Jackson, Roosevelt-Colonel White, and Fairview-Roth

zones may have constituted exceptions to this general rule and we cannot conclude that these did not have adverse racial effects. Similarly, although none of the elementary school optional zones today have any significant potential effects in terms of increased racial separation, the same cannot be said of the high school optional zones. Two of these zones, those between Roosevelt and Colonel White and between Kiser and Colonel White, are by far the largest in the system and have had the most demonstrable racial effects in the past."

The testimony of Dr. Gordon Foster, Director of the Florida School Desegregation Consulting Center at the University of Miami, indicates that the Colonel White-Roosevelt optional attendance area is almost a classic example of segregation practice:

"Q Dr. Foster, with reference, first of all, to the option attendance zones, you described certain effects.

Are there short term as well as long term effects of the ultilization of optional attendance zones?

"A Yes. In the ones we talked about at the high school level, if we can cite the Roosevelt-Colonel White optional zone, and the following Colonel White-Kiser optional zone, the short term effect it seems to me is to allow whites to move out of a school assignment that is becoming black, and I should point out that this is not to say that in many cases that at a certain point blacks also take advantage of this option.

"In the Colonel White-Kiser situation, for example, as Colonel White has become blacker, we are at the point where there are no whites apparently opting now to go to Colonel White."

Further testimony of Dr. Foster demonstrates the deleterious effect that the optional attendance zones had on school integration in Dayton:

"Q In what way do optional attendance areas affect desegregation and the stability of pupil assignment to particular schools?

"A. Well, essentially in my opinion they create instability in the public in one way in terms of housing choices where there are choices and in terms of perception of whether a school is going black or staying white, this sort of thing, so that generally where you have an optional zone which has racial implications, you have an unstable situation that everybody realizes is in a changing environment. So, what it usually does is simply accelerate whatever process is going on or work toward the acceleration of the changing situation.

"Q. The optional attendance zones which you have identified in your testimony today, what is your opinion with respect to the effect or if there is any effect on racial composition of schools in Dayton?

"A. Well, in my opinion, these accelerated and precipitated further segregation, and in those cases where I was able to cite hard figures, I think that is very definitely borne out, and I have no reason to believe that in all the other cases the same thing was true although I can't cite actual pupil figures from year to year because they simply aren't available."

We conclude that the District Court correctly found that the optional attendance zones used in Dayton were an element of the cumulative violation of the constitutional rights of the appellants.

(C) Rescission of the Board's Resolutions

The District Judge rendered the following as a finding of fact:

"At the general election in November, 1971, the electors of the school district of Dayton elected three members for a four year term commencing January 1, 1972. Issues

at such election involved the matter of school attendance zones and transportation of pupils. Two incumbent members of the Board ran for reelection, one did not. One incumbent was relected and two new members of the Board were added. On December 8, 1971, the 1971 Board met to consider resolutions dealing with transportation of students and zone attendance lines. All members present were duly elected, qualified and acting members of the Board, although two of them were so-called 'lame ducks,' who would not be members of the Board after December 31, 1971.

"The Board adopted several resolutions. These resolutions recognized the existence of racial segregation in the Dayton schools, the role played by the Board in the creation of the racial patterns and the concommitant responsibility of the Board to eradicate these patterns through affirmative action. The types of affirmative action recognized included the elimination of the old attendance zones and the transportation of students for the purpose of achieving the city-wide racial balance of students. . . .

"Immediately thereafter, one member of the Board who had voted with the majority, requested reconsideration and was improperly ruled out of order. The Board met subsequently on December 6, 1971 [sic], and January 3, 1972. At the end of the latter meeting, the Board ended its term of office and the 1972 Board took its place. On January 3, at its first meeting, the 1972 Board rescinded the resolutions passed on December 8. Since the 1971 Board had passed out of existence, the action of the 1972 Board on January 3, 1972, was not in the nature of a reconsideration but instead was a rescission of the previous action."

From this finding of fact, the District Judge concluded:

"The right of the majority to override protected minority rights has clear limitations in our constitutional democracy. See *Reitman* v. *Mulkey*, 387 U.S. 369 (1967); *Hunter* v. *Erickson*, 393 U.S. 385 (1969); also see *Alkire* v. *Cashman*, -- F.Supp. -- (S.D. Ohio E.D. 1972). The rescission in early 1972 of the resolutions adopted by the 1971 School Board constituted an independent violation of the Equal Protection Clause rights enjoyed by the black minority of Dayton. See *Bradley* v. *Milliken*, 433 F.2d 897 (C.A. 6 1970); *Oliver* v. *Kalamazoo Board of Education*, 346 F.Supp. 766 (W.D. Mich. S.D. 1971), *aff'd*. 448 F.2d 635 (C.A. 6 1971)."

The passage of the three resolutions and their subsequent rescission by a Board of a different composition are factual matters about which there is no dispute. As hereinbefore stated, the record amply supports the District Judge's findings that racially imbalanced schools and optional attendance zones were elements of the cumulative violation of the appellants' constitutional rights. Accordingly, when the Dayton Board at its December 8, 1971, meeting passed resolutions designed, among other things, to eliminate racial imbalance and optional attendance zones in Dayton schools, it was acting in a manner consistent with its constitutional duties. Therefore, the rescission by a subsequent Board of these resolutions designed to carry out the Board's constitutional duties was an element of the cumulative violation of the appellants' constitutional rights as guaranteed by the Equal Protection Clause of the Constitution.

The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took. Cf. *Hunter* v. *Erickson*, 393 U.S. 385 (1960); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation. If the Board was under such a duty, then the rescission becomes a part of the cumulative violation, and it is not necessary to ascertain whether the rescission *ipso facto* is an independent violation of the Constitution.

In view of our conclusion in this case that the rescission was a part of the cumulative violation of appellants' constitutional rights, we find it unnecessary to pass on the question of whether the rescission by itself was a violation of those rights.

We affirm the District Court's holding that racially imbalanced schools, optional attendance zones, and the Board's rescission of the three resolutions are cumulatively in violation of appellants' rights guaranteed by the Equal Protection Clause.

IV. Other Alleged Constitutional Violations

On appeal, the appellants raise at least four other school practices which purportedly maintained and expanded the basically dual school system inherited at the time of *Brown*. These practices are in the areas of (A) staff assignment, (B) school construction, (C) grade structure and reorganization, and (D) transfers and transportation. The District Judge did not include any of these practices within his finding of cumulative violation of the appellants' constitutional rights.

(A) Staff Assignment

The record reveals that prior to the 1951-52 school year the Dayton Board basically assigned all black teachers only to schools with all black pupils and all white teachers to schools with predominantly white student bodies pursuant to an explicit segregation policy of the Board. In 1951-52, the Board introduced a new policy ostensibly to integrate the faculties, but which effectively continued in practice the racial assignment of faculty through the 1970-71 school year.

In a letter dated March 17, 1969, the Acting Director of the Office of Civil Rights of HEW notified the Dayton Board that "an analysis of the data obtained during the (compliance) review establishes that your district pursues a policy of racially motivated assignment of teachers and other professional staff."

Other relevant portions of this letter are contained in Section II of this opinion. Following receipt of the letter, the Dayton Board negotiated with HEW and agreed to desegregate its staff so "that each school staff throughout the district will have a racial composition that reflects the total staff of the district as a whole" in accordance with the principles of *United States* v. *Montgomery County Board of Education*, 395 U.S. 225 (1969). Thereafter, the Dayton Board realigned its school staffs for the 1970-71 school year.

The appellants admit that progress has been made with respect to eliminating segregative staff assignment, but allege that the agreement with HEW has not been fulfilled in that vestiges of the former practices persist which continue to identify schools as "black schools" or "white schools." As an example, at the high school level, the following table was presented by the appellants to demonstrate how Board assignment of its professional staff still served to identify schools as "black schools" or "white schools" in 1971-72 (w means white, b means black):

	Pupil % Black	*Faculty % Black*	*Principal*	*Coaches*
Belmont	5.2	23.1	w	10w, 2b
Wilbur Wright	9.2	28.5	w	10w, 3b
Kiser	9.8	20.1	w	10w, 2b
Meadowdale	10.6	23.5	w	13w, 3b
Stivers	14.0	32.4	w	10w, 4b
Fairview	24.1	29.8	w	10w, 5b
Col. White	54.6	32.0	w	9w, 6b
Roth	95.8	43.5	b	9w, 7b
Roosevelt	100.0	47.4	b	8w, 8b
Dunbar	100.0	50.3	b	7w, 9b

The witness Dr. Robert L. Green, Dean of the Urban College and Professor of Educational Psychology at Michigan State University, testified as follows:

"Q. Dr. Green, I believe I informed you that the faculties were desegregated as a result of HEW action in 1970.

"Do you have an opinion as to whether or not the effects of this history of faculty assignment persist in terms of identification of schools as black or white in the school district after the changing of the faculties as was done in this case?

"MR. GREER: Objection, your Honor.

"THE COURT: Overruled.

"A. Yes. The answer is yes, Mr. Lucas. When there has been historical practice of p'acing black teachers in schools specified as being essentially black schools and white teachers in schools that are identified or specified as being essentially white schools, even though faculty desegregation occurs, be it on a voluntary basis or under court order, the effect remains that school is yet perceived as being a black school or white school, especially if at this point in time the pupil composition of those schools are essentially uni-racial or predominantly black or predominantly white.

"Q. Dr. Green, you did examine the '68-'69 statistics for the Dayton School System, is that correct?

"A. Yes.

"Q. And did you in examining the data note any correlation between the pupil composition of black or white and the faculty composition black or white?

"A. Yes, I did, Mr. Lucas.

"Q. Do you have an opinion whether this is isolated instances of correlation or is there any systematic pattern to it?

"A. There seems to be a systematic pattern as it relates to black teachers and the racial composition of schools vis-a-vis black youngsters and white youngsters being essentially placed in schools that are predominantly white."

The witness Dr. Foster testified as follows:

"Q. . . . In light of that history, could you give us your opinion as to the effect, first of all, of that policy before the change, in terms of identification of schools as black or white and the effects of that change on the present situation in the Dayton School System?

"MR. GREER: Objection.

"THE COURT: Overruled.

"A. Well, my opinion is that this policy and practice before the change we assume took p'ace, especially since it is in a northern district, wou'd indicate that the Board is missing or has missed a golden opportunity to prove that it does want to run a unitary system and remove segregation practices insofar as it is able, because the Board clearly, as I understand it, under most State laws, or all State laws, can assign teachers willy-nilly in the System wherever they want to. This is not a free choice matter.

"Q. Is it also an annual option that the school Board has?

"A. Yes, in terms of assignment. In terms of my opinion on what this does, as recently changed, assuming this, I would have to say that this does not remove by any means the vestages of a segregated system since it is only one component of several important aspects of a system segregated or desegregated. I think it is a very important component, and I think it is a step certainly in the direction of desegregation, and a very positive step.

"But coupled with the other most important step of pupil assignment, so long as the schools themselves remain segregated, as they certainly do at this time in my opinion in Dayton, then the fact that teachers or staff being desegregated, if we assume that doesn't carry near the weight it would if the total desegregation process had taken place."

Dr. Wayne M. Carle, Superintendent of Schools in Dayton at the time of the trial, testified as follows:

"BY MR. LUCAS:

"Q. Would you answer my preliminary question, then. Did you agree with the HEW conclusion that there was purposeful faculty and staff segregation in the Dayton School System?

"MR. GREER: We would object to this, your Honor, as it simply asks a self-serving conclusion of the witness.

"THE COURT: I am going to overrule your objection. You may answer.

"A. There is no question but what that was so.

BY MR. LUCAS:

"Q. Now, Doctor, I think you stated that there had been substantial faculty desegregation. Has there also been staff desegregation and, if you will, limit it to what you have defined as line personnel, principals, assistant principals?

"A. There has been considerable desegregation of administrative staff, but there still is a high correlation between the race of pupils and the race of the administrator.

* * *

"Now, today the percentage of black administrators is around 32 or 33 percent, as I recall. That indicates less discrimination in promotion, since there is more relationship between the percentage of teachers, which now is perhaps 34 or 35 percent, and administrators. But I am saying that with respect to their assignment, and particularly at the high school level, there is an almost perfect correlation between the race of the principal and the predominating race in the school. All four black high schools, for example, have black principals. All the other high schools have white principals. So that that considerable vestige of segregation still has not been eliminated. There would be other instances, if you just scan the statistics, in which previously all black or nearly black staff similarly have weighted errors in them, that

is, the error is still in the direction of the previous discrimination. If the staff previously were 70 percent and now should be, let's say, 30 percent black, it may still be 40 percent because of difficult factors in resolving it.

"In all cases, or probably in all cases, that error or that difference is still weighted to the previously fully segregated pattern, so that it is very difficult I think, to understand the depth of segregation. It is so pervasive that its vestiges are difficult. These are two areas in which that is very obvious."

(B) School Construction

The District Judge did not include the Dayton Board's school construction practices within the cumulative violation because he found the underlying motives behind such construction to be racially neutral, rendering the following as a finding of fact:

"(c) Site selection and construction

"(9) Since 1954 the school board of Dayton has constructed 14 new elementary schools and 69 elementary school additions. The construction follows the pattern of growth in the Dayton area and follows the specific policy of 'building schools where children are, or where they are expected to be.' New construction of elementary schools are largely on the periphery of the center city. There are instances of errors in Board planning in that some areas have not developed as expected and other developed areas have not become part of the Dayton School District, as expected. There are examples of schools operating substantially below capacity. While reasonable minds might reasonably differ on selection and construction of some schools, sufficient evidence has not been presented that school construction was segregative in nature other than to provide schools in white neighborhoods which remain predominately white and schools in black neighborhoods which remain predominately black.

"(10) Five new high schools and fourteen high school additions have been constructed in the past eighteen years. Construction of some high schools followed the pattern of construction of elementary schools in that sites selected were away from the center of the city and in neighborhoods which were predominately white. Other sites could have been selected near the center of the city in black neighborhoods. Such schools would arguably, at least, have had a larger proportion of whites attending such schools.

"Site selection is a matter of judgment and no evidence has been presented that the Board of Education failed to use neutral criteria in its choices. In the construction of schools, the Board, over the years, has been presented with options. Plaintiffs have failed to sustain their burden of showing that the defendant Board exercised those options presented in an improper fashion."

On appeal, the appellants contend that there is substantial evidence in the record to support their claim that the Dayton Board's practices in school construction had a segregative effect and contributed substantially to the alleged present duality in pupil assignment. The record reveals that in the period of greatest expansion of the Dayton school system, from the late 1940's to the mid 1960's, the great majority of new schools and additions were located by the Board in either virtually all black or all white areas. Of 24 new schools constructed between 1950 and the present, 22 opened 90 per cent or more black or white. The following table contains some examples:

High Schools	*Date of Opening*	*% Black at Opening*	*% Black Pupils 1972-1973*
Patterson	1954	0.0	32.9
Belmont	1956	0.0	5.2
Meadowdale	1960	0.0	10.6
Dunbar	1962	92.3	100.0

Elementary Schools			
Orville Wright	1952	0.0	8.1
Miami Chapel	1953	100.0	99.8
Horace Mann	1954	0.0	3.1
Bell Haven	1954	0.0	17.1
Hickorydale	1957	0.0	32.5
Meadowdale Elem.	1957	0.0	12.6
Louise Troy (Primary)	1957	100.0	99.1
Shoup Mill	1958	0.0	3.8
Carlson	1958	95.0	99.0
Jackson Primary	1960	99.9	99.7
McNary Park (Primary)	1964	100.0	100.0
Res. Park (Primary)	1966	96.5	100.0
Valerie	1966	0.0	24.0

On the issue of school construction practices, Dr. Foster testified as follows:

"Q. Dr. Foster, would you at this point tell me if you made an inquiry into the question which I think related to the construction issues of site selection?

"A. Yes.

"Q. And what was that inquiry?

"A. In terms of the use of site selections to maintain segregation, in the new construction sites from 1950 which we have already discussed to the present, many of these have helped to promote and to impact and lock in segregated or isolated situations either in the inner city or in the suburbs, and I think this is true in terms of both school segregation and housing segregation, that is, in terms of its effects. First of all, in the area of the white suburban expansions which are farthest from the center of the city which is all black, and these were, of course, more inaccessible at the time of construction than they are now. We have Valerie which was built in 1966 which is almost at the extreme north of the district. We have Meadowdale High School built in 1960 and Meadowdale Elementary built in 1957 to the north of

the district. We have Shoup Mill built in 1958 and to the nearly extreme north. The south and east of the furthest white suburban expansion, we have Eastmont, on the extreme east built in 1965. We have Wilbur Wright to the northeast built in 1952, Horace Mann to the southeast built in 1954, and Belmont High School in the southeast built in 1956.

"Now, contrary-wise, in the inner city during this time there were a couple of examples of schools which were built into locked-in situations in terms of segregation, and in fact these schools were surrounded by other schools which were all black. That would be McNary in 1964 and Jackson Primary in 1960.

"Q. Dr. Foster, in your experience, use of the primary unit in close proximity to elementary schools, has this been a matter reflective of segregation practices in your experience?

"A. Yes. It is in a sense very much nothing more than an addition. They are on the same campus and for all practical purposes they are really one school.

"Q. What effect does this have on the existing racial concentrations?

"A. Well, it tends to secure it and to further insure that those schools are going to remain segregated and that the system as a whole is going to remain segregated."

Based on this evidence, the appellants dispute the District Court's conclusion that the Dayton Board's school construction practices were not a part of the cumulative violation. The appellants contend that on facts similar to those presented in this case the Supreme Court in *Swann, supra*, 402 U.S. at 20-21, found major constitutional violations on which a District Court could fashion a remedy.

(C) Grade Structure and Reorganization

The appellants' primary objection in this area is to the establishment of a middle school system in the 1971-72 school

year which allegedly had a segregative effect. Dr. Foster testified as follows:

> "My conclusion is that the establishment of the middle schools in 1971 resulted in the establishment of four out of five schools that were clearly racially identifiable, therefore, increasing or maintaining segregation as opposed to availing the opportunity of decreasing it."

Further, after the establishment of the new middle school structure, the Ohio State Department of Education gave the following advice to Dayton school authorities:

> "If what appears to be happening with middle schools is in fact happening, then Dayton has only added one more action to a long list of state-imposed activities which are offensive to the Constitution and which are degrading to school children. Along with many other affirmative duties which the Dayton Board must fulfill, correction of this particular offense must occur."

The District Court found that the boundaries established for the middle schools in September 1971 had "neither segregative nor integrative effect." The appellants submit that this finding means, under applicable legal standards, that the Board acted unconstitutionally to maintain segregation in the face of an opportunity to accomplish substantial desegregation. The appellants assert that the action of the Dayton Board was intentional because the Board was aware of desegregation alternatives but instead choose a plan whose predictable impact was not to further integrate the Dayton school system.

(D) Transfers and Transportation

Finally, the appellants contend that transfer and transportation practices of the Dayton Board, which might have held promise to accomplish further desegregation, have operated to maintain segregation and further earmark schools as "black"

or "white." In support of this contention, the appellants cite evidence that curriculum, hardship and disciplinary transfers have operated frequently to assign white children from "black schools" to "whiter schools" and black children from "white schools" to "blacker schools." Further, there is evidence in the record revealing that the Board assigned tuition pupils from outside the district on a dual basis; white pupils were assigned to white schools and black pupils were assigned to black schools.

The testimony of John Harewood, Assistant Superintendent of Dayton schools in charge of administration, reveals two instances in which children were bused "intact" with the effect of segregating children on a racial basis in separate classrooms within schools. In 1963, white children from Ruskin School were transported intact to separate classes in the mixed Central School. In the spring of 1968, some of the black children from Edison School, which had been partially destroyed by fire, were similarly segregated within a number of white schools throughout the city.

The District Court's only conclusion in the area of transfer and transportation practices was with regard to the school system's Freedom of Enrollment program. The District Court required that program be revised for Dayton high schools so that transfers for purpose of improving racial balance take precedence over curriculum transfers.

On the basis of the evidence adduced, the appellants' legal argument in this area is that the transfer and transportation practices of the Dayton Board had the "clear effect of earmarking schools according to their racial composition" which is proscribed by *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 202 (1973).

(E) Conclusion as to Other Alleged Constitutional Violations

As hereinabove indicated in Section IV of this opinion, the appellants have raised serious questions with respect to whether the District Judge's failure to include these four school practices within the cumulative violation was supported by substantial evidence. In view of our holding in Section V hereof, we conclude that it is unnecessary at this stage to pass on whether the District Judge's findings of fact with respect to these four school practices is supported by substantial evidence.

V. Remedy

As more fully described in Section I hereof, the District Court ordered the Dayton Board of Education to submit a desegregation plan that conformed to all requirements of law. Subsequently, the four-member majority of the Dayton Board submitted an eleven point plan characterized by the appellants as a "free choice plan." Other plans were submitted to the District Court by the three-member minority of the Dayton Board and Dayton Classroom Teachers' Association. Without holding a hearing on the remedy issue, the District Court approved the plan of the Dayton Board majority with one modification.

The appellants' primary contention on appeal is that the desegregation plan approved by the District Court is inadequate to remedy the cumulative violation found by the District Court. We agree.

On receipt of the Board majority plan, the District Court was obliged "to assess the effectiveness of . . . [the] proposed plan in achieving desegregation . . . . in light of the circumstances present and the options available in each instance." *Green* v. *County School Board*, 391 U.S. 430, 439 (1968). The appellants assert that the circumstances present here, namely a cumulative violation, required a remedy of "all-out desegregation." *Keyes, supra*, 413 U.S. at 214. The appellants further assert that the plan of the Board minority would accomplish such "all-out desegregation" and that therefore we should remand this case to the District Court with instructions that it order the plan of the Board minority implemented.

Today we simply hold that the remedy ordered by the District Court is inadequate, considering the scope of the cumulative violations. The case is remanded to the District Court for proceedings to formulate a desegregation plan for the Dayton school system consistent with the remedial guidelines outlined in *Keyes, supra,* and *Swann, supra.* This holding does not necessarily require the District Court to implement the plan of the Board minority, but "all vestiges of state-imposed segregation," *Swann, supra,* 402 U.S. at 15, must be eliminated.

In formulating a desgregation plan, the District Court of course will adhere also to the guidelines enunciated by the Supreme Court in *Milliken* v. *Bradley,* —— U.S. —— (No. 73-434, July 26, 1974), reversing *Bradley* v. *Milliken,* 484 F. 2d 215 (6th Cir. *in banc* 1973).

Once the plaintiffs-appellants have shown that state-imposed segregation existed at the time of *Brown* (or any point thereafter), school authorities "automatically assume an affirmative duty . . . to eliminate from the public schools within their school system 'all vestiges of state-imposed school segregation.'" *Keyes, supra,* 413 U.S. at 200. When such a showing has been made, "racially neutral" plans which fail to counteract the continuing effects of past school segregation are inadequate. *Id.* at 210-13.

VI. Other Directions on Remand

In its Supplemental Order on Remedy, dated July 13, 1973, the District Court suggested that its disposition of the case appeared "to require the dismissal of those non-Dayton defendants." We disagree with this suggestion as to the State defendants.

The District Court is directed to keep the State defendants as parties to this action. Although, according to the District Court order of procedure, evidence as to a state violation was supposed to be excluded from the initial trial, the following evidence was adduced: The Dayton school district is chartered by the Ohio State Department of Education, and without such a charter, the district would be without power to operate and could not receive state aid. Ohio Revised Code, §§ 3301.16 and 3317.01. Since an Ohio Attorney General's opinion dated July 9, 1956, the State Department of Education has known that it has an affirmative duty under both Ohio and federal law to take all actions necessary, including, but not limited to, the withholding of state and federal funds, to prevent and eliminate racial segregation in the public schools. Finally, during the years in question in this case, the Dayton school district was denied any allocation of state funds for pupil transportation, although such funds were made available to most suburban and rural school districts in the state.

VII. Other Issues

Several other issues were presented which do not now require discussion. All contentions of the parties contrary to the conclusions reached in this opinion have been carefully considered and are found to be without merit.

VIII. Conclusion

The District Court's holding of a cumulative violation of the appellants' constitutional rights, as contained in its Findings of Fact and Memorandum Opinion of Law dated February 7, 1973, is affirmed.

Since we conclude that the remedy prescribed by the District Court is inadequate, the case is remanded to the District Court with directions to revise and supplement its order of July 13, 1973, entitled "Supplemental Order on Remedy," so as to formulate, in accordance with the guidelines hereinabove set forth, a desegregation plan for the Dayton school system and for other proceedings to that end not inconsistent with this opinion.

D. DISTRICT COURT'S JANUARY 7, 1975 ORDER RELATING TO SUBMISSION OF PLAN.

(Filed January 7, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. 72-137

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al.,

Defendants.

ORDER

This matter comes before the Court pursuant to remand by the United States Court of Appeals for the Sixth Circuit and following informal conferences called by the Court limited to one attorney for the plaintiffs and one attorney for the defendants. The Court would be remiss if it did not recognize the contributions of plaintiffs' attorney, Louis Lucas, and defendants' attorney, David Greer, whose research, counsel and suggestions materially assisted the Court in the preliminary phase of this matter.

Based upon such conferences, the controlling decisions in this Circuit, and the state of the law on the subject as announced by the Supreme Court of the United States, the Court concludes that it is now appropriate to deal with

specific plans. The parties, including the plaintiffs, the defendant Board of Education of Dayton, and the Board of Education for the State of Ohio will confer and prepare plans either jointly or separately for submission to this Court which will accomplish the following ends and satisfy the requirements set forth in the opinion of the United States Court of Appeals for the Sixth Circuit, 503 F.2d 684 (1974).

In the twenty years that have elapsed since *Brown* v. *Board of Education*, 347 U.S. 483 (1954), large numbers of American cities have faced the problem that now confronts Dayton and have adopted varying methods to solve it. Able, conscientious, and knowledgeable experts in this field have developed. Departments of government, both state and national, are anxious to assist. The experience of other cities and the available experts should be consulted by the parties in the ultimate solution of this problem. Such devices as "pairing" of schools, "clustering" of schools, alterations of attendance boundaries, "magnet" schools, feeder patterns, increasing school capacity, new construction and voluntary transfers, should all be considered. No known desegregation device should be overlooked. The proposals of the Board of Education, both those presented in response to this Court's Order of February, 1973, and those suggested in the informal discussions above referred to should not be abandoned. The thought and planning that preceded these proposals should not be ignored. These proposals have not been considered unresponsive; they have been considered insufficient. They do represent a base for further expansion.

The Court draws particular attention to the proposal of the Dayton School Board to construct magnet schools in the downtown area. It may well be that further development of this concept might achieve the desired goals as to high schools on a voluntary basis.

The Dayton freedom of enrollment program should not be abandoned. It, too, may contribute in great measure to a solution of the problem.

Deliberately absent from the foregoing suggestions is that of transporting students to accomplish racial balance. It does

not require much wisdom or foresight to recognize that this coercive solution is the least satisfactory. The Court will consider transportation of students only as a last resort and only after careful inquiry has established that no other solution exists.

One word of admonition: This is not a problem that will disappear by itself. It is concerned with basic constitutional rights that every public official, including this Court, is sworn to uphold.

In February of 1973, this Court observed that no peaceful community could long exist where two separate societies viewed each other from ever higher walls of suspicion and distrust. The tragic events of the past three months in the city of Boston, Massachusetts, have confirmed this observation with distressing consequences.

With full respect for the Board's knowledge and ability; with full recognition of its representative responsibilities; and with full faith in its dedication and good will, the Court now requests the Board of Education to report upon the months of study and planning that have been completed as they relate to a solution of the problem herein.

The Board of Education will submit its plan to the Court on or before February 1, 1975. A completed plan will be made available for public inspection on or before January 20, 1975. Should it appear necessary, hearings on such plan and any other submitted by interested parties will be held on or before February 15, 1975.

It is so ORDERED.

/s/ CARL B. RUBIN
United States District Judge

E. DISTRICT COURT'S MARCH 10, 1975 ORDER ADOPTING PLAN OF DAYTON BOARD OF EDUCATION.

(Filed March 10, 1975)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil No. 72-137

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, Governor
of the State of Ohio, et al.,

Defendants.

ORDER

This matter is before the Court pursuant to remand by the United States Court of Appeals for the Sixth Circuit. In accordance therewith this Court on January 7, 1975, directed the School Board of the City of Dayton to submit a plan of desegregation by February 1, 1975 consistent with such Order of Remand. Subsequently, plaintiffs also filed a plan and a hearing on both was held February 17, 19, and 20, 1975.

I. Basis of Court's Consideration

In order to place this Court's consideration of any remedial plan in a proper context certain introductory observations should be made:

1. All desegregation efforts must be tested initially against the principle that separate facilities limited to blacks and whites are forbidden;[1]

2. Racial balance, i.e., a reflection of the district percentages in each school is not a Constitutional right equivalent to the principle above enunciated;[2]

3. It is not the function of district courts to operate public school systems, to determine social values, or to engage in restructuring of communities, personal attitudes, or sociological benefits, except as these matters may bear upon Constitutional rights.[3]

To the foregoing the court would add the following which

[1] "In the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal"; Brown v. Board of Education, 347 U.S. 483 (1954) (Brown 1).

[2] *Swann v. Board of Education*, 402 U.S. at page 24:

"If we were to read the holding of the District Judge to require as a matter of substantive Constitutional rights any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The Constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole."

See also: Milliken v. Bradley, —— U.S. —— (1974), 94 S.Ct. 3112 at p. 3125.

"The failure of an educational agency to attain a balance on the basis of race, color, or sex or national origin of students among its schools shall not constitute a denial of equal educational opportunity or equal protection of laws." 20 U.S.C. § 1704.

[3] "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a Constitutional violation, however, that would not be within the authority of a federal court." Swann v. Board of Education, supra.

may be deemed findings of fact whether implicit in or explicated by previous opinions of this Court.

1. The State of Ohio does not now, nor has it since 1887 mandated a dual system of public education. To the contrary, 84 Ohio Law 34, dated February 22, 1887, specifically required a unitary public school system.

2. The defendant School Board of the City of Dayton had engaged in activities which were segregative in effect and which did impinge upon the Constitutional rights of students in such system. At no time, however, did defendant maintain a dual system of education.

3. Overt evidences of such segregative activities have been eliminated both by action of the Board of Education and by previous Order of this Court but the effect thereof may not.

II. Duty of District Courts

With the determination that acts of segregation did occur it is now necessary to examine the duty imposed upon this Court under such circumstances. While there is a variation in the description of such duty, this Court elects to be guided in this matter by the following: "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown* v. *Board of Education*, (Brown II), 349 U.S. 294.

There is, however, a final admonition in *Swann* that bears careful attention: "As with any equity case, the nature of the violation determines the scope of the remedy." *Swann* v. *Board of Education, supra* at p. 16.[4]

[4] A subsequent determination by the Supreme Court of the United States in *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973) holds there is broad discretionary power granted to trial courts in shaping equity decrees. Lemon, it should be pointed out, is not a school desegregation case.

Two events that bear upon the scope of appropriate remedy have occurred since August 20, 1974, the date of the appellate holding in this case. These events may well have changed both "the nature of the violation" and the "scope of the remedy." They require further discussion.

First: Effective October 20, 1974, the Congress of the United States adopted the Equal Educational Opportunities Act, 20 U.S.C. § 1701 *et seq.*[5]

Section 1701 declares it to be the policy of the United States that:

"1. All children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

2. The neighborhood is the appropriate basis for determining public school assignment."

Section 1712 imposes a limitation upon courts in the following language: "In formulating a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, a court . . . shall seek or impose only such remedies as are essential to correct *particular denials of equal educational opportunity or equal protection of the laws.* [Emphasis added]

In § 1713 is listed a priority of remedies and in § 1714 there is a specific limitation which holds: "No court . . . shall pursuant to § 1713 of this Title order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such students."

Second: On December 6, 1974, the United States Court of Appeals for the Sixth Circuit decided *George and Carolyn Higgins* v. *Board of Education of the City of Grand Rapids,* (No. 73-2189), — F.2d — (1974). The Court in *Higgins*

[5] The effective date of the above act is said to be, "On and after the sixtieth day after August 21, 1974."

followed *Deal* v. *City of Cincinnati Board of Education,* 369 F.2d 55, *cert. denied* 389 U.S. 847, in these words: "*Deal* [upheld] the constitutionality of retaining neighborhood schools where racial imbalance has not been caused by any discrimination on the part of school officials."[6]

If the nature of the violation determines the scope of the remedy, it becomes critical to determine whether or not there is an unremedied district-wide segregative act. This Court found in its Order of July 13, that specific segregative acts, since eliminated; the existence of optional attendance zones, now eliminated; and conditions of racially imbalanced schools together required action by the federal courts.

We do not deal with a mandated dual school system; we do not deal with actions taken on a school-by-school basis.[7] We do deal with a system that has in the past permitted segregative practices to exist. The issue, therefore, is whether a plan intended to improve the educational opportunities for all students without a school-by-school restructuring basis is appropriate. This Court holds at this time that it is.

III. Plaintiffs' Plan

The plaintiffs have urged upon this Court a plan which will assign students among the Dayton schools in a black/white

[6] *Higgins* mentions *Brinkman* v. *Gilligan* on page 19. This Court respectfully suggests that the following sentence contained therein: "These three findings were held in their cumulative effect to be enough to reflect *de jure* segregation.", requires for full significance an examination of the specific holding of the court. See footnote 7 *infra.*

[7] The only district-wide action of the defendants involved the rescission of resolutions in January of 1970. The United States Court of Appeals dealt with the issue as follows:

"We hold that the findings of fact upon which the District Court based its conclusion of accumulative violations are not clearly erroneous but to the contrary are amply supported by the evidence. Fed. R. Civ. P. 52A. However, we do not pass upon the question at the present time as to whether the rescission of the Board resolutions in and of itself constituted an independent violation of the Constitution. *Brinkman* v. *Gilligan,* 503 F.2d 684 at 693.

ratio approximating the district-wide ratio for such schools with a variation of 15%, plus or minus, from the mean.[8] To accomplish this, the plaintiffs would create "clusters" of elementary schools, additional middle schools, and redistricted high schools. The term "cluster" is taken to mean a group of schools, usually more than two, within a common attendance district to which students will be sent irrespective of proximity to their place of residence.[9] Plaintiffs' plan is a comprehensive one; it was carefully prepared and well-presented. It will do what the plaintiffs urge must be done. It is not intended to, nor will it, in and of itself, provide alternate educational programs or seek innovative learning experiences. In the plaintiffs' view, these are obligations of any school board irrespective of the integration or segregation of the schools. Since this question is not before the Court, it will not be ruled upon.

In the Order of Remand by the United States Court of Appeals for the Sixth Circuit, the following appears:

"In formulating a desegregation plan, the District Court, of course, will adhere also to the guidelines enunciated by the Supreme Court in *Milliken* v. *Bradley*, —— U.S. ——, 94 S.Ct. 3112 (1974)."

The majority opinion by Chief Justice Burger includes the following: "Viewing the record as a whole, it seems clear that the District Court and the Court of Appeals shifted the primary focus from a Detroit remedy to the metropolitan area only because of their conclusion that total desegregation of Detroit would not produce the racial balance which they perceived as desirable. Both courts proceeded on an assumption that the Detroit schools could not be truly desegregated – in

[8] According to the testimony the appropriate percentages of Black students for the year 1974-1975 are:

Elementary Schools	44.2%
Middle Schools	68.7%
High Schools	45.5%

[9] Portions of the record dealing with this transportation are included herein as Appendix A.

their view of what constituted desegregation – unless the racial composition of the student body of each school substantially reflected the racial composition of the population of the metropolitan area as a whole. . . . In *Swann* which arose in the context of a single independent school district the Court held, 'If we were to read the holding of the District Court to require as a matter of substantive Constitutional rights any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse; 402 U.S. at 24.

The clear import of this language from *Swann* is that desegregation in the sense of dismanteling a dal school system does not require any particular racial balance in 'each school, grade or classroom.'" 94 S.Ct. at 3125.

It would seem, therefore, that whether the area in question is a single school district as in *Swann* or in multi-school districts as in *Milliken,* the obligation does not exist to create racial balance which is in essence the sole function of the plaintiffs' plan.

Accordingly, this Court holds that a comprehensive plan, such as plaintiffs suggest, is not required at this time. We hold also that plaintiffs' plan as presented is violative of the Equal Educational Opportunities Act, 20 U.S.C. § 1701, *et seq.*, and particularly §§ 1713 and 1714.

IV. The Defendant's Plan

The defendant's plan was presented to the Court in a 17 page memorandum with a 26 page exhibit of tables and statistics and a 69 page appendix. It also contains much extraneous material. Only the "magnet" program and the "learning centers" concept require comment.

A magnet high school[10] with programs not offered at home high schools and "satellite" magnet programs intended to attract students from their high schools and districts of resi-

[10] The term "magnet high school" is deemed to mean a school open to all students with programs sufficiently attractive that students will elect to attend. The Stivers-Patterson vocational complex is one example of a magnet school.

dence is proposed. If successful, the magnet program will provide an opportunity to students, both black and white, to obtain additional educational advantages equally attractive to both. Magnet schools are an acceptable desegregation device. 20 U.S.C. § 1713(f).

The magnet's schools are supplemented by "learning centers" for foreign languages and business education for 6th, 7th, and 8th grades; career motivation for 4th and 5th grades; science for 5th, 6th, 7th and 8th grades; and a science environmental center for the 6th grade.

Learning centers to which students are transported are integrative in concept. Plaintiffs assert that such transportation is also violative of 20 U.S.C. §§ 1713 and 1714 since it would require bussing of students to schools other than the school closest or next closest to his or her place of residence. We leave this argument for another day and another court. We hold only that the plan comports with the Congressional declaration of policy set forth in 20 U.S.C. § 1701.

The overall plan is desegrative in intent; it is not violative of *Brown* v. *Board of Education, supra,* and it does not appear to violate the mandate of the United States Court of Appeals for the Sixth Circuit so long as the following limitations are observed:

1. All programs including the magnet schools and the learning centers must be so located that the burden of transportation is substantially equal upon both black and white students;

2. The composition of all classes must be no less than the mean for the appropriate schools plus or minus 15%;[11]

3. The faculty assigned to all programs must reflect the racial percentages of faculty within the system as a whole;

[11] See Footnote 9.

4. The amount of time of student assignment to classes in learning centers shall not be less than 20% of such student's total instructional time.

It is entirely possible that the proposed program will not attract an appropriate number of black and white students and might instead further segregate the Dayton school system. Because it is innovative, because it offers the opportunity for alternative quality education, and because it has been proposed by a board of popularly elected officials, the Plan should be given a fair trial. The Board's plan will be accepted provisionally for the school year 1975 — 1976. The provisional acceptance requires this Court once more to continue jurisdiction of this matter.

There is an omission in the comprehensive plan submitted by the defendants. It is not possible to determine whether the numerous desegregative techniques set forth in this Court's Order of January 7, 1975, have been fully investigated. It is not known, for example, whether adjustments of existing school attendance zones would reduce concentrations of black and white attendance. It is not known whether feasible pairing or clustering of schools could be accomplished without bussing violative of the Equal Educational Opportunities Act.

Accordingly, the defendants are directed to conduct such a study and to report to this Court on or before October 1, 1975, of the results thereof on a school-by-school basis. Further hearings will thereupon be held and an alternative plan consistent with the Equal Educational Opportunities Act will be established on or before January 1, 1976.

In the event defendants are unable by the methods approved in July of 1973 and those approved by this Order to accomplish what this Court deems to be adequate progress in complying with the Equal Educational Opportunities Act and the mandate of the United States Court of Appeals for the Sixth Circuit, such alternative plan will become effective for the school year beginning in September, 1976, and for all school years thereafter.

V. The Dayton School Board

The willingness of this Court to accept defendant's plan at this time is dictated in part by the attitude of the School Board in the City of Dayton. This Court has not been faced with the problems of Judge James B. McMillan who dealt with a recalcitrant school board in *Swann* v. *Charlotte Mecklenburg Board of Education, supra,* nor with those of Judge W. Arthur Garrity, Jr., who has dealt with a contumacious school board in Boston. Any reasonable plan submitted by a board which has demonstrated good faith is entitled in the first instance to careful consideration by a court and in cases of doubt to have such doubt resolved in its favor. Good faith is a two-way street.

VI. Progress of the Case

The pace at which desegregation cases proceed through the courts has been a source of concern by courts and a source of frustration for litigants.[12] It has frequently been observed that over 21 years has elapsed since *Brown* v. *Board of Education, supra,* and the problem appears far from solved. It can even be asserted that the magnitude of the problem has in fact increased in that time. To postpone yet again the ultimate determination of this matter may appear to the plaintiffs to be a further delay of their rights. A chronology of the significant

[12] The complexities of school desegregation have resulted in the following instances of prolonged litigation:

a. *Goss* v. *Board of Education of the City of Knoxville, Tennessee,* original District Court opinion, 186 F.Supp. 559 (1960), recent opinion of United States Court of Appeals for the Sixth Circuit, 444 F.2d 632 (1971):

b. *Kelly* v. *Board of Education of the City of Nashville* (subsequently Metropolitan County Board of Education of Nashville), original District Court opinion, 139 F.Supp. 578 (1956), recent opinion of the United States Court of Appeals for the Sixth Circuit, 463 F.2d 732 (1972).

c. "These appeals represent another installment of an already lengthy serial: 'The desegregation of the Memphis Public School System'. The initial chapter of this story was written in 1960 . . ." *Northcross* v. *Board of Education of Memphis City Schools,* 466 F.2d 890 (1972).

dates in this proceeding might held to place the matter in its proper context.

This case was filed in May of 1972. It was heard on the merits in November of 1972.

A Findings of Fact and Memorandum Opinion of Law was filed in February of 1973. An Order imposing integrative remedies upon defendants was filed in July of 1973. During the school year 1973 — 1974 and 1974 — 1975 these remedies were in effect.

The Order of Remand by the United States Court of Appeals for the Sixth Circuit became effective in October of 1974. The Order herein will at the minimum be effective for the school year 1975 — 1976.

While this is hardly a model of speed and dispatch, it is consistent with the magnitude of the problem that must be solved.

In the mass of rhetoric, emotional outbursts, and demogoguery that have attended the progression of many school desegregation cases, a few voices have been heard to suggest a rule of moderation. One such by Senior Judge Clifford O'Sullivan of the United States Court of Appeals for the Sixth Circuit bears repetition:

> "The hope or dream that one day we will have become a people without any motivation borne of our differing racial beginnings will have a better chance of fulfillment if patience accompanies our endeavors. Strident and truculent judicial commands could indeed exacerbate what now remains of racial bias and prejudice."
> *Goss* v. *Board of Education of the City of Knoxville, Tennessee,* 444 F.2d 632 at 640.

VII. Conclusion

In view of the foregoing, the Court holds as follows:

1. The plan of the defendants as modified herein will have an integrative effect upon the Dayton school system and is provisionally adopted for the school year 1975 — 1976.

2. The plan of the plaintiffs is violative of The Equal Educational Opportunities Act, 20 U.S.C. § 1701, et seq., and imposes a burden upon the defendant school board beyond that which it is presently required to bear.

3. The state of the law in desegregation cases, the Order of Remand in this case, and the Congressional intent in the Equal Educational Opportunities Act, supra, do not require the adoption of a mathematical ratio plan wherein each school, grade or classroom of the district shall contain any particular balance of black and white students representative of the district as a whole.

4. Where the previous actions of a school board indicate only a difference of opinion on a subject concerning which reasonable minds may reasonably differ, bad faith will not be presumed and a proposal, although novel and untried, will be given an opportunity for success.

5. In view of the developments, subsequent to August 20, 1974, the Court is of the opinion that holdings herein regarding the Equal Educational Opportunities Act involve a controlling question of law as to which there is substantial grounds for difference of opinion and an immediate appeal from this Order may materially advance the ultimate termination of the litigation. Accordingly, the Court does so certify in accordance with 28 U.S.C. § 1292(4)(b). An application for appeal in accordance with this determination shall not stay the proceedings in this Court.

It is so ORDERED.

/s/ CARL B. RUBIN
United States District Judge

APPENDIX A TO MARCH 10, 1975 ORDER

. . . after this matter was raised during the Louisville argument in the Sixth Circuit, and the Court's inquiry was whether or not the Act of Congress could overcome the constitutional provisions which were being enforced by the courts, and I think I had related that to the witness. I am not sure, but I was present when the Sixth Circuit asked that question, and that conformed with my earlier reading of the Broomfield Amendments which had a similar purpose but, however, had the same saving clause about the power of the courts is not impaired where necessary to remedy a constitution violation.

THE COURT: Well, we are not going to debate the constitutionality of an Act of Congress. I am concerned with the presentation of a plan where it is somewhat peripheral as to the consideration of this Act.

Mr. Greer, you may continue.

CONTINUATION OF CROSS EXAMINATION

BY MR. GREER:

Q. Yesterday, Doctor Foster, we discussed the schools that were left unaffected by your pairing and clustering at the elementary level, and the two examples of the contiguous pairing in your plan. Let's move on to the other nine clusters that comprise your elementary school plan. Each of those nine clusters involve a substantial amount of required bussing of school children to schools beyond those that are closest or next closest to their place of residence; isn't that correct?

A. I believe that is correct, yes.

Q. Let's look, for example, at cluster F of your group. A child in the Lewton school district which is in the eastern part of Dayton is required to spend grades 4 and 5 in Edison school which is on the west side of Dayton; is that not right?

A. That's right.

Q. And am I not also correct that the following schools are closer to the Lewton district: Eastmont, Grant which you are converting to a middle school —

A. Would you hold that just a minute so I can make a note of those?

Q. Sure.

A. All right. Between Lewton and Edison you are speaking of?

Q. That's correct.

A. And what are the schools again?

Q. Well, let me just list them off It would be Eastmont, Kemp, Washington which in your original plan you were going to close, Franklin, Cleveland, Belmont, Horace Mann and then another school that you are planning to turn into a middle school which is Ruskin, Huffman, Webster, Emerson, Patterson, McGuffey, Hawthorne which is your original plan was going to be closed, Irving and Whittier.

A. Well, if you are talking about a direct line between the two schools, you couldn't possibly get all those schools in between the two you are speaking of.

Q. My question wasn't phrased in terms of the way the crow flies. It is whatever schools are closer to the residence of a child living in the Lewton district, and all of those schools would be closer to that child's residence; isn't that true?

A. You mean as the crow flies?

Q. Let's get a lame crow and say going in any direction. Let's make an arc just so we know the distance of what is closer to a child living in the Lewton district.

A. It would say it generally might be true, but to say it was true, I would want to go to the map.

THE COURT: Why don't you do that, Doctor.

THE WITNESS: How many schools did you name altogether?

BY MR. GREER:

Q. Eighteen different schools.

A. All right.

Q. And the same type of situation, of course, would be true in that cluster with respect to students living in the Edison district who would be going over to the east end of Dayton in grades 1 through 3; isn't that true?

A. Yes.

Q. If we turn to cluster C, a child in the first or second grade at Eastmont would be required to be bussed beyond some seventeen or eighteen closer schools in order to attend classes at Highview; isn't that correct?

A. Yes.

Q. And vice versa the same kind of situation would be true for a child living in the Highview district during grades 3 to 5?

A. Yes.

Q. If we look on cluster I, the required bussing between Cardendale and Shiloh passes by ten school zones which are closer to the residences of the children in those two affected school districts; isn't that right?

A. Without counting them, I would believe that is probably accurate, yes.

Q. And without going through the tedium of each of these clusters, isn't it true that the same kind of cross-town required bussing affects students in 24 out of the 28 school zones that are paired or grouped in clusters under your proposal?

A. Again without counting, I would believe that would probably be accurate, yes.

Q. And you have before you the statistics, of course, as to the number of children enrolled in these various schools, don't you?

A. Yes.

Q. Am I not correct in each year something in the area of 9,000 students under your plan would be bussed beyond the second closest school to their place of residence?

A. Pardon me just a second.

Well. I don't get quite that many. At a quick count, I get something like 7,000.

Q. Does that comprise all of the students in these 24 out of 28 school Zones?

A. It would comprise the students in the clusters that you referred to, and our count should be the same because my counts were the same as your staff person that testified about students being bussed in the clusters.

Q. Right. What you just computed for me has been the nine out of the eleven clusters that we started talking about today?

A. That's correct.

F. COURT OF APPEALS' JUNE 24, 1975 OPINION.

(Filed June 24, 1975)

No. 75-1410

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARK BRINKMAN, ET AL., *Plaintiffs-Appellants*, v. JOHN J. GILLIGAN, ET AL., *Defendants-Appellees*.	APPEAL from the United States District Court for the Southern District of Ohio.

Before: PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

PHILLIPS, Chief Judge. For a second time this court is called upon to review the constitutionality of a plan ordered by the District Court for the school system of Dayton, Ohio, to remedy cumulative constitutional violations found to exist in that school system. Reference is made to the previous decision of this court, reported at 503 F.2d 684 (6th Cir. 1974), for a detailed recitation of facts and issues.

By a statute enacted February 22, 1887, the State of Ohio abolished separate schools for white and Negro children. Nevertheless, the District Court found that the Dayton school system has failed in many particulars to meet the standards of Ohio law mandating an integrated school system and to comply with the equal protection clause of the fourteenth amendment. Segregative acts and practices were found to have occurred both before and after the decision of the Supreme

Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and to have continued down to the present time. These findings of fact as to segregative practices in Dayton are set forth in detail in our former opinion and will not be repeated here. Suffice it to say that in our former opinion this court ruled that the findings of fact of the District Court as to unconstitutional practices on the part of Dayton School officials are not clearly erroneous, but to the contrary are supported by substantial evidence.

Although the phrase "de jure" does not appear in our former opinion, the meaning of that decision is that the Dayton school system has been and is guilty of de jure segregation practices. *See Keyes* v. *School District No. 1*, 413 U.S. 189 (1973).

We agreed with the District Court as to his findings of fact in our former opinion, but held the remedy ordered by that court to be inadequate, considering the scope of the constitutional violations. We remanded the case to the District Court with directions to formulate a desegregation plan for the Dayton school system consistent with the remedial guidelines outlined in *Keyes, supra*, and in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

In our former opinion we said:

> Once the plaintiffs-appellants have shown that state-imposed segregtation existed at the time of *Brown* (or any point thereafter), school authorities "automatically assume an affirmative duty . . . to eliminate from the public schools within their school system 'all vestiges of state-imposed school segregation.'" *Keyes, supra*, 413 U.S. at 200, 93 S.Ct. at 2693. When such a showing has been made, "racially neutral" plans which fail to counteract the continuing effects of past school segregation are inadequate. *Id.* at 210-213, 93 S.Ct. 2686. 503 F.2d at 704.

On remand the District Court required the plaintiffs and the Board of Education to submit plans. The plaintiffs' plan

was rejected. The Board's plan was adopted for the school year 1975-76 with minor modifications.

The present appeal is from the decision of the District Court implementing the Board's plan. The question on appeal is whether the Board's plan conforms to the mandate of this court in our decision reported at 503 F.2d 684. We hold that it does not.

The plan approved by the District Court contains some provisions which apparently might effect some improvements in the segregated conditions found to exist in this school system. Some of its key features are as follows:

1. The closing of Roosevelt High School, with its 100 per cent black enrollment. The students previously enrolled at Roosevelt High would be permitted to attend any high school of their choice.

2. Creation of a downtown magnet high school at the Central YMCA, with programs not offered at home high schools, to serve a maximum of 300 students at any one time, and satellite magnet programs intended to attract students from their high schools and districts of residence, which could serve not more than 375 students at any one time. The District Court said: "If successful, the magnet program will provide an opportunity to students, both black and white, to obtain additional educational advantages equally attractive to both." The students would remain in their assigned schools for all other instruction.

3. Creation of three magnet learning centers at which elementary students could participate in foreign language, career motivation, and business education programs. The three centers together would serve about 880 students, who would remain in their assigned schools for other instruction.

4. Expansion of science centers to accommodate additional elementary students. The centers would have a racially balanced enrollment, and attendance would be mandatory, but only ten percent of the student's total instruction time would be spent at the centers.

5. A new vocational school for high school students, known as Kiser Career Center, would be established. This school would have a balanced racial composition, serving 210 students on a free-choice basis.

6. Restructuring of Miami Chapel elementary school into an alternative elementary school with enrollment optional and on a full-time basis. Miami Chapel has a capacity of over 700 students, but the Board anticipates that the school as restructured will serve approximately 500 students. Miami Chapel presently is an all-black school serving 380 students, and there is some indication in the record that these students, if not admitted to the restructured school, will be assigned to the all-black Louise Troy or Wogaman schools.

7. Creation of a magnet alternative school for 150 intermediate grade level students in an attempt to keep potential drop-outs in school, without regard to race.

8. The freedom of enrollment and open enrollment programs put into effect earlier by the Board would be continued.

In approving this plan, the District Court added the following provisions:

1. All programs including the magnet schools and the learning centers must be so located that the burden of transportation is substantially equal upon both black and white students;
2. The composition of all classes must be no less than the mean for the appropriate schools plus or minus 15%;
3. The faculty assigned to all programs must reffect the racial percentages of faculty within the system as a whole;
4. The amount of time of students assignment to classes in learning centers shall not be less than 20% of such student's total instructional time.

This is essentially all the relief afforded by the District Court

for the 1975-76 school year. The court expressed uncertainty as to whether the plan would be completely effective and ordered the Board to develop and file a more comprehensive plan by January 1, 1976. The court stated that if the 1975-76 plan should prove to be ineffective, an alternate plan would be instituted for the school year beginning in September 1976.

The District Court described the approved plan as "desegregative in intent" and concluded that it would have "an integrative effect." It appears that the plan contains some significant curricular innovations and that it would be a step toward integration of the Dayton school system. We believe, however, that more is required by the Constitution, by recent decisions of the Supreme Court, including those herein cited, and by the previous mandate of this court. As the appellants point out, under the plan approved by the District Court the basic pattern of one-race schools will continue largely unabated. The plan does not even purport to dismantle Dayton's one-race schools other than Miami Chapel and Roosevelt High School, and even if the magnet plans are successful, the vast majority of one-race schools will remain identifiable as such. The District Court's plan fails to eliminate the continuing effects of past segregation and is, therefore, inadequate.

In the course of his opinion, the District Judge noted two events which have occurred since our first opinion in this case, both of which he thought supported the narrow remedy he ordered on remand.

The District Court said:

> First: Effective October 20, 1974, the Congress of the United States adopted the Equal Educational Opportunities Act, 20 U.S.C. § 1701 *et seq.*
>
> Section 1701 declares it to be the policy of the United States that:
>
> "1. All children enrolled in public schools are entitled

to equal educational opportunity without regard to race, color, sex, or national origin; and

2. The neighborhood is the appropriate basis for determining public school assignment."

Section 1712 imposes a limitation upon courts in the following language: "In formulating a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, a court . . . shall seek or impose only such remedies as are essential to correct *particular denials of equal educational opportunity or equal protection of the laws.* [Emphasis added]

In § 1713 is listed a priority of remedies and in § 1714 there is a specific limitation which holds: "No court . . . shall pursuant to § 1713 of this Title order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such students."

Second: On December 6, 1974, the United States Court of Appeals for the Sixth Circuit decided *George and Carolyn Higgins* v. *Board of Education of the City of Grand Rapids,* (No. 73-2189), 508 F.2d 779 (1974). The Court in *Higgins* followed *Deal* v. *City of Cincinnati Board of Education,* 369 F.2d 55, *cert. denied* 389 U.S. 847, in these words: "*Deal* [upheld] the constitutionality of retaining neighborhood schools where racial imbalance has not been caused by any discrimination on the part of school officials."[6]

[6] *Higgins* mentions *Brinkman* v. *Gilligan* on page 19. This Court respectfully suggests that the following sentence contained therein: "These three findings were held in their cumulative effect to be enough to reflect *de jure* segregation.", requires for full significance an examination of the specific holding of the court.

The Equal Educational Opportunity Act of 1974 by its terms does not prevent the District Court from carrying into effect

the previous mandate of this court. 20 U.S.C. § 1702(b) expressly provides:

> (b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, *except that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.* (Emphasis supplied.)

We construe the 1974 Act, read as a whole, as not limiting either the nature or the scope of the remedy for constitutional violations in the instant case.

There could be no possible merit in the contention that the opinion of this court in *Higgins,* relating to the school system of Grand Rapids, Michigan, altered in any way the nature of the cumulative violations described in our former opinion in the present case or the scope of the constitutional remedy required by this court on the remand which we directed in that opinion. The law in the present case is embodied in the opinion of this court reported at 503 F.2d 684. Our previous opinion is not changed in any way by *Higgins,* which dealt with a different school system and a distinguishable factual situation.

Appellants have petitioned for summary reversal. Except for the time factor, we would be inclined to grant this relief. However, it obviously would be difficult if not impossible, in the limited time now available, for the District Court to formulate a comprehensive plan for the 1975-76 school term and to put it into effect in September 1975 without disruption of the large school system in the Dayton school district.

Instead of summary reversal, we remand this case to the District Court with directions to modify the plan previously approved for the 1975-76 school year so as to improve the racial

balance before September 1, 1975, in as many of the remaining racially identifiable schools in the Dayton system as feasible.

We further direct that black students who attended the Miami Chapel elementary school during the 1974-75 school year, and who are not assigned to the restructured Miami Chapel school, be assigned to other than all-black schools during the 1975-76 school year.

The District Court already has expressed an intention to adopt a revised and improved plan for the school year 1976-77. On remand we direct that the court adopt a system-wide plan for the 1976-77 school year that will conform to the previous mandate of this court and to the decisions of the Supreme Court in *Keys* and *Swann*. We direct that this plan be adopted not later than December 31, 1975, so that it may be placed in effect at the beginning of the new school year in September 1976.

This case is remanded to the District Court for further proceedings consistent with this opinion.

The mandate of this court on the present appeal will issue forthwith. The costs of this appeal are taxed against the Dayton Board of Education.

G. COURT OF APPEALS' JUNE 24, 1975 REMAND JUDGMENT.

(Filed June 24, 1975)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 75-1410

MARK BRINKMAN, ET AL.,

Plaintiffs-Appellants,

v.

JOHN J. GILLIGAN, ET AL.,

Defendants-Appellees.

Before: PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby remanded for further proceedings.

It is further ordered that Plaintiffs-Appellants recover from

the Dayton Board of Education the costs on appeal, as itemized below, and that execution therefore issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk
By /s/ GRACE KELLER
Grace Keller
Chief Deputy

Issued as Mandate: June 24, 1975
COSTS: Amount to be determined later
Filing fee ----------$
Printing $
Total $

A True Copy.
Attest:

John P. Hehman, Clerk
By /s/ GRACE KELLER
Chief Deputy

H. DISTRICT COURT'S DECEMBER 29, 1975 ORDER.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-3-75-304

MARK BRINKMAN, et al.,
Plaintiffs,

v.

JOHN J. GILLIGAN, et al.,
Defendants.

ORDER

This matter is before the Court pursuant to Order of Remand by the United States Court of Appeals for the Sixth Circuit expressed in the following terms:

> We direct that the Court adopt a system-wide plan for the 1976-1977 school year that will conform to the previous mandate of this Court and the decisions of the Supreme Court in *Keyes* and *Swann*.[1]

Pursuant to such remand, defendant Dayton Board of Education and plaintiff NAACP presented plans to the Court. Testimony and evidence in support thereof was presented on December 8-9, 1975. A third plan based upon findings by the late Dr. Charles A. Glatt, Court-appointed expert, was presented by a group known as "Friends of Dr. Glatt" although no evidence or testimony accompanied such plan. The Court notes in passing the significant contribution of Dr. Glatt to this most complex problem.

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[1] *Brinkman* v. *Gilligan*, 518 F.2d 853 at 857.

A determination of this matter and its future progress will be considered under the following headings:

I. Standards of Examination

II. Master

III. Community Participation

IV. Conclusions of Law

I.

STANDARDS OF EXAMINATION

Given the predicate that the limited segregatory activities found by this Court in its Order of February 7, 1973, brings this matter within the ambit of *Swann*[2] and *Keyes*,[3] the remedy must be obvious. This Court now reaches the reluctant conclusion that there exists no feasible method of complying with the mandate of the United States Court of Appeals for the Sixth Circuit without the transportation of a substantial number of students in the Dayton school system. Based upon the plans of both the plaintiff and defendant the assumption must be that the transportation of approximately 15,000 students on a regular and permanent basis will be required. No contrary remedial suggestion has been offered by any person or group. No authority has been found or cited that would justify any other disposition.

An analysis of the two plans submitted discloses more a difference of technique than a difference of result. In essence, the plaintiffs would pair and cluster existing elementary schools in a fashion to insure a racial balance approximating that of the school district as a whole with existing attendance zones of such schools remaining approximately intact. The existing

[2] *Swann* v. *Charlotte Mecklenburg Board of Education*, 402 U.S. 1 (1973).

[3] *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973).

elementary schools would provide feeder patterns for the appropriate high schools. Under plaintiff's plan almost every student would at some time be transported to and from school.

Defendants' plan is based upon a series of choices to be made by parents which will provide educational alternatives.[4] Defendants have agreed that there is nothing inherent in their plan to prevent racial balancing appropriate to the district as a whole and it is in this context that such plan has been considered.

It would be foolish indeed to ignore the rhetoric that has accompanied twenty years of the school desegregation problem. The catch phrases, "forced busing," "quality education," "racial balance," and "white flight," have served as a form of shorthand mainly to obscure rather than to clarify the nature of the problem involved.

This Court's position and determination can best be understood by a reference to personal judicial philosophy as it bears upon the overall subject of educational racial discrimination.

I believe that it is not the function of the United States District Court to oversee the methods whereby children are instructed. I believe that it is not the function of the United States District Court to advance by judicial fiat any social philosophy, however benign. The temptation to do either or both has proved almost irresistible in the field of school desegregation.

The qualitative nature of education is a matter for local determination. The citizens of a school district are entitled to select, free from federal supervision, those elected representatives who in the citizens' collective opinion will best administer such school system. The citizens are entitled to determine the amount they are willing to pay for the educational

[4] Counsel for the defendants has asserted that defendants have "submitted" a plan rather than "proposed" or "recommended a plan. In view of this Court's holding (page 8), the distinction appears irrelevant.

facilities they desire. It might appear that the foregoing statement is basic enough to be included in an eighth grade Government text. True. But the significance of this lesson apparantly has been lost upon those who ignore its validity. It is only when elected representatives deny equality of treatment that federal courts should intervene.

It can be urged with assurance that in a pluralistic society all children should be exposed at the earliest feasible time to children of other backgrounds. True. I agree that both the children and society itself will benefit. I do not agree, however, that a failure of exposure, in and of itself, amounts to a constitutional deprivation correctable only by the federal courts. In sum, there are aspirations of a peaceful and happy society that do not rise to a constitutional level and are not therefore attainable in a court of law.

Court deal with rights, not ethical behavior, not social accommodations, but rights, rights guaranteed by the Constitution of the United States. That is and should be the limit of our function.

In contrast to the foregoing, it is a constitutional right enforceable in the federal courts that students, irrespective of race or residence, shall share equally all facilities of a school system, both the superior and the inferior.

The only feasible method of sharing requires a balancing in each school between black and white students in a ratio approximating the system-wide balance. Insofar as either plan will result in an acceptable redistribution, such plan meets the constitutional limitations set forth in both the *Swann* and *Keyes* cases.

The defendants may adopt their own plan, may adopt the plaintiff's plan, may combine the two, or any parts thereof, provided that each school in the school district as of September 1, 1976, is desegregated as defined herein.

Alternate schools, traditional schools, magnet schools and open schools are all acceptable if properly racially balanced: None is acceptable if not.

At this time the composition of the Dayton School District is approximately 48% black – 52% white. So long as the schools of the Dayton School District each reflect this district ratio plus or minus 15%, they will be deemed to be desegrated.[5] Accordingly, this Court does therefore ORDER that as of September 1, 1976, each and every school in the Dayton School District will have a pupil population approaching the district percentage, but deviating no more than 15%, plus or minus.

There is a specific and limited exception from the foregoing that the Court will permit. Under the present system in force in Dayton, Ohio, students commence attendance at a specific high school in the tenth grade and remain there until graduation some three years later at the end of the twelfth grade. A high school is more than a collection of classrooms. It is an entity in which the students take deep pride. It is frequently the first and often the last educational entity with which students identify. There would appear to be something unfair in a situation that might destroy the continuity of athletic teams, student publications and activities. The one or two years already spent in a high school has created a loyalty that should be encouraged. There are all too few such institutions still remaining in our society today.

Limited only to high school students and limited only to the academic years of 1976-1977 and 1977-1978, the Court will permit those students already enrolled in a specific high school to graduate from that high school, even though the ultimate determination of attendance boundaries would exclude them therefrom. This privilege shall not be extended to any student not already enrolled in the tenth or eleventh grades of a specific high school.

The Court notes the following language in *Swann*:

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[5] See Footnote 12, *Higgins* v. *Board of Education of the City of Grand Rapids*, 508 F.2d 779 at 787 (6th Cir. 1974).

> The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.[6]

In a situation, however, where a specific school should deviate further from the foregoing percentages by reason of geographic location, the Court will consider such instances on a school-by-school basis.

II.

MASTER

In the achieving of the redistribution required on a school-by-school basis, the guidelines will be followed wherever possible for elementary students.

1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;
2. Students should be transported to the nearest available school;
3. No student should be transported for a period of time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter.

The logistics involved will be complex and time-consuming. The establishment of attendance zones for each of the schools will require supervision by this Court. Accordingly, in accordance with Rule 53 of the Federal Rules of Civil Procedure, the Court does find that this case is one wherein exceptional conditions require the appointment of a Master.

Dr. John A. Finger of Providence, Rhode Island, is hereby appointed Master to supervise such undertaking. Such Master will have all of the powers set forth in Rule 53(c),

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[6] *Swann*, *supra* at page 24.

Fed. R. Civ. P., and will at the earliest possible time submit to this Court a report indicating the number of students by race who will attend each of the schools in the Dayton school system in accordance with the direction set down heretofore. An opportunity will be given to the defendant to obtain promptly information regarding parent choices as outlined on pages 81-83 of the defendant's plan. Such Master will receive out-of-pocket expenses and compensation for his services rendered in such amount as the Court may determine. Previous Orders of this Court directing assistance to Dr. Finger will apply equally to his service as Master.

III.

COMMUNITY PARTICIPATION

The parties are in agreement that a citizens board should be appointed to monitor the plan as ultimately adopted and to insure that it functions in accordance with the Order of this Court. Such a board composed of representative citizens of the community will be appointed for a period not to exceed three years. The Court will reserve the right to extend or to terminate the services of such board, should such prove advisable. Defendants are directed to make space available for the needs of such board, to provide necessary secretarial and clerical assistance, and to make available at all reasonable times such information as the board may from time to time require. The members of this board will serve without compensation, but will be reimbursed for out-of-pocket expenses which will be taxed as court costs in this matter.

IV.

CONCLUSIONS OF LAW

A.

A school system composed of schools where the attendance meets the district ratio plus or minus 15% is a desegregated

system as contemplated in *Keyes* v. *School District No. 1* and *Swann* v. *Charlotte Mecklenburg Board of Education.*

B.

Variations from the foregoing may be permitted in exceptional circumstances without destroying the desegregation of such system.

C.

Educational techniques, experimental schools and expanded parent choice are not matters relating to constitutional deprivations so long as the requirements of Conclusion of Law A are followed.

D.

Defendant, Dayton Board of Education, must provide adequate transportation for all students affected by reassignment to comply with this Order.

It is so ORDERED.

/s/ CARL B. RUBIN
Carl B. Rubin
United States District Judge

I. DISTRICT COURT'S DECEMBER 29, 1975 JUDGMENT.

(Filed December 29, 1975)

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-3-75-304

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, et al.,

Defendants.

JUDGMENT

This action came on for hearing before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that limited only to high school students and limited only to the academic years of 1976-1977 and 1977-1978, the Court will permit those students already enrolled in a specific high school to graduate from that high school, even though the ultimate determination of attendance boundaries would exclude them therefrom. This privilege shall not be extended to any student not already enrolled in the tenth or eleventh grades of a specific high school. Where a specific school should deviate further from the foregoing percentages by reason of geographic location, the Court will consider such instances on a school-by-school basis.

In the achieving of the redistribution required on a school-by-school basis, the guidelines will be followed wherever possible for elementary students.

1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;

2. Students should be transported to the nearest available school.

3. No student should be transported for a period of time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter.

The establishment of attendance zones for each of the schools will require supervision by this Court. Accordingly, in accordance with Rule 53 of the Federal Rules of Civil Procedure, the Court does find that this case is one wherein exceptional conditions require the appointment of a Master.

Dr. John A. Finger of Providence, Rhode Island, is hereby appointed Master to supervise such undertaking. Such Master will have all of the powers set forth in Rule 53 (c), Fed. R. Civ. P., and will at the earliest possible time submit to this Court a report indicating the number of students by race who will attend each of the schools in the Dayton school system in accordance with the direction set down heretofore. An opportunity will be given to the defendant to obtain promptly information regarding parent choices as outlined on pages 81 – 83 of the defendant's plan. Such Master will receive out-of-pocket expenses and compensation for his services rendered in such amount as the Court may determine. Previous Orders of this Court directing assistance to Dr. Finger will apply equally to his service as Master.

The parties are in agreement that a citizens board should be appointed to monitor the plan as ultimately adopted and to insure that it functions in accordance with the Order. A board composed of representative citizens of the community

will be appointed for a period not to exceed three years. The Court will reserve the right to extend to or terminate the services of such board, should such prove advisable. Defendants are directed to make space available for the needs of such board, to provide necessary secretarial and clerical assistance, and to make available at all reasonable times such information as the board may from time to time require. The members of this board will serve without compensation, but will be reimbursed for out-of-pocket expenses which will be taxed as court costs in this matter.

A school system composed of schools where the attendance meets the district ratio plus or minus 15% is a desegregated system as contemplated in *Keyes* v. *School District No. 1* and *Swann* v. *Charlotte Mecklenburg Board of Education.*

Variations from the foregoing may be permitted in exceptional circumstances without destroying the desegregation of such systems.

Educational techniques, experimental schools and expanded parent choice are not matters relating to constitutional deprivations so long as the requirements of Conclusion of Law A are followed.

Defendant, Dayton Board of Education, must provide adequate transportation for all students affected by reassignment to comply with this Order.

Dated at Dayton, Ohio, December 29, 1975

JOHN D. LYTER, CLERK
/s/ Rebecca J. Ellis, Deputy

J. DISTRICT COURT'S MARCH 23, 1976 ORDER.

(Filed March 23, 1976)

No. C-3-75-304

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARK BRINKMAN, et al,

Plaintiffs,

v.

JOHN J. GILLIGAN, et al,

Defendants.

ORDER

This matter is before the Court for consideration of the Master's report heretofore filed. Pursuant to the filing of such report a hearing was held March 22 and 23, 1976, in accordance with Rule 53(e)(2) of the Federal Rules of Civil Procedure. At such hearing the parties were given an opportunity to present evidence and testimony.

Upon consideration of such report and the testimony and evidence presented, the Court is of the opinion that such report should be disposed of as follows:

I.

ELEMENTARY SCHOOLS

That portion of the Master's report dealing with the desegregation of elementary schools in the Dayton School District by the device of pairing is in keeping with the mandate of the United States Court of Appeals for the Sixth Circuit and the order of this Court dated December 29, 1975. Accordingly, such pairing assignment is hereby adopted.

The Master's report recommends a semiannual exchange of paired schools with a similar exchange assignment of teachers.

Defendant Dayton Board of Education has proposed an annual exchange without movement of teachers (Board Exhibit CW).

Subject to the limitations set forth on page 5 of this Court's order of December 29, 1975,[1] defendant may adopt either method.

The proposal of defendant Dayton Board of Education seeks a three-phase implementation over a three year period. In view of the mandate of the United States Court of Appeals for the Sixth Circuit, 518 F.2d 833 at 857, such "phase in" is hereby rejected.

Certain elementary schools will be desegregated by zone change. Such zone changes as are recommended in the Master's report are hereby approved.

II.

HIGH SCHOOLS

The Master's report for desegregating high schools recommends a selection by students plus a random assignment where necessary (Master's report pp. 15-18). Defendant has suggested an assignment program by specific attendance districts (Board Exhibit CV).

Subject to the limitations set forth on page 5 of this Court's order of December 29, 1975, and subject further to the exception for high school juniors and seniors set forth on pages 5 and 6 of such order, defendant may adopt either method of assignment.

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[1] "At this time the composition of the Dayton School District is approximately 48% black — 52% white. So long as the schools of the Dayton School District each reflect this district ratio plus or minus 15%, they will be deemed to be desegregated. Accordingly, this Court does therefore ORDER that as of September 1, 1976, each and every school in the Dayton School District will have a pupil population approaching the district percentage, but deviating no more than 15%, plus or minus."

III.

MISCELLANEOUS

The report of the Master dealing with "Handicapped and Special Education Program," "Magnet Schools," and "Magnet Programs for Grades 6, 7 and 8" are hereby adopted.

Defendant's attention is directed again to the following portion of the order of December 29, 1975:

> "Alternate schools, traditional schools, magnet schools and open schools are all acceptable if properly racially balanced. None is acceptable if not."

IV.

FURTHER PROPOSALS

The order of reference heretofore referred to directed the Master to report upon particular issues. Portions of the Master's report not dealing with those particular issues will be deemed personal recommendations of such Master and not requiring action by this Court.

This order is intended to be a final and appealable order and a determination pursuant to the mandate of the United States Court of Appeals for the Sixth Circuit.

No determination herein shall be deemed to bar the submission of any other plan to this Court that would be consistent with the standards set forth in the order of December 29, 1975. The Court will at all times entertain a motion by any party for consideration of any specific procedure and approval will be freely granted so long as the restrictions above set forth are adhered to.

It must be obvious to all parties concerned that the longer an opportunity is given for students, teachers and the community to understand a specific plan, the easier a transition period will be. In any proposal for a change after this date, the Court will take into consideration the amount of "lead time" available prior to September 1, 1976. In the event the Court determines that a proposed change should be adopted

but that insufficient time remains prior to September 1, 1976, such improvement may be adopted effective September 1, 1977, or such other date as might appear appropriate at the time.

V.

SUMMARY

Defendant has raised five objections to the report of the Master:

1. Pupil assignment should be made by the central administration;
2. Pupil assignment should be made in the spring of 1976;
3. Transfer of elementary students should be made on a yearly rather than on a semester basis;
4. The Elementary School Plan should be a three-phase plan and
5. High School assignment should be on the basis of geographic zone rather than upon choice and random assignment.

The Court has disposed of such objections as follows: With the exception of Objection 4 which has been rejected, the defendant Dayton Board of Education may assign students by action of the central administration, may assign students this spring, may transfer elementary school students on an annual basis, and may assign high school students by geographic zones.

All of the foregoing being subject to the limitations of this Court's order of December 29, 1975.

All other questions still remaining before the Court, such as payment of attorney fees and the sharing of costs among the several defendants herein are hereby continued for further disposition.

IT IS SO ORDERED.

CARL B. RUBIN
United States District Judge

K. DISTRICT COURT'S MARCH 25, 1976 JUDGMENT.

(Filed March 25, 1976)

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-3-75-304

MARK BRINKMAN, et al.,

Plaintiffs,

v.

JOHN J. GILLIGAN, et al.,

Defendants.

JUDGMENT

This action came on for hearing before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that upon the consideration of the Master's report and the testimony and evidence presented in accordance with Rule 53(e)(2) of the Federal Rules of Civil Procedure, that such report should be disposed of as follows:

I ELEMENTARY SCHOOLS: That portion of the Master's report dealing with the desegregation of elementary schools in the Dayton School District is hereby adopted. Defendant Dayton Board of Education has proposed an annual exchange without movement of teachers (Board Exhibit CW); the Master's report recommends a semiannual exchange of paired schools with a similar exchange assignment of teachers.

Subject to the limitations set forth on page 5 of this Court's Order of December 29, 1975, defendant may adopt either method. Certain elementary schools will be desegregated by zone change. Such zone changes as are recommended in the Master's report are hereby approved.

II HIGH SCHOOLS: The Master's report for desegregating high schools recommends a selection by students plus a random assignment where necessary (Master's report pp. 15-18). Defendant has suggested an assignment program by specific attendance districts (Board Exhibit CV). Subject to the limitations set forth on page 5 of this Court's Order of December 29, 1975, and subject further to the exception for high school juniors and seniors set forth on page 5 and 6 of such order, defendant may adopt either method of assignment.

III MISCELLANEOUS: The report of the Master dealing with "Handicapped and Special Education Program," "Magnet Schools," and "Magnet Programs for Grades 6, 7, and 8" are hereby adopted. Defendant's attention is directed again to the following portion of the order of December 29, 1975: "Alternate schools, traditional schools, magnet schools and open schools are all acceptable if properly racially balanced. None is acceptable if not."

IV FURTHER PROPOSALS: No determination herein shall be deemed to bar the submission of any other plan to this Court that would be consistent with the standards set forth in the order of December 29, 1975. The Court will at all times entertain a motion by any party for consideration of any specific procedure and approval will be freely granted so long as the restrictions above set forth are adhered to.

In any proposal for a change after this date, the Court will take into consideration the amount of "lead time" available prior to September 1, 1976. In the event the Court determines that a proposed change should be adopted but that insufficient time remains prior to September 1, 1976, such

improvement may be adopted effective to September 1, 1976, such improvement may be adopted effective September 1, 1977, or such other date as might appear appropriate at the time.

The following objections were raised by Defendant and are disposed of as follows:

1. Pupil assignment should be made by the central administration;
GRANTED;

2. Pupil assignment should be made in the spring of 1976;
GRANTED;

3. Transfer of elementary students should be made on a yearly rather than on a semester basis;
GRANTED;

4. The Elementary School Plan should be a three-phase plan;
REJECTED;

5. High School assignment should be on the basis of geographic zone rather than upon choice and random assignment;
GRANTED;

THE FOREGOING BEING SUBJECT TO THE LIMITATIONS OF THIS COURT'S ORDER OF DECEMBER 29, 1975.

All other questions still remaining before the Court are hereby continued for further disposition.

APPROVED FOR ENTRY:

/s/ CARL B. RUBIN
Carl B. Rubin
United States District Judge

JOHN D. LYTER, CLERK
/s/ REBECCA J. ELLIS
Rebecca J. Ellis, Deputy

Dated at Dayton, Ohio, this
24th day of March, 1976.

L. DISTRICT COURT'S MAY 14, 1976 ORDER.

(Filed May 14, 1976)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil No. C-3-75-304

MARK BRINKMAN, et al.,
Plaintiffs,

v.

JOHN J. GILLIGAN, et al.,
Defendants.

ORDER

This matter is before the Court on the motion of defendant Dayton Board of Education dated May 11, 1976, to modify the Report of the Master. Such motion is in six branches. The first five branches of such motion refer to matters that appear to be within the limits of modification set forth by this Court in its Order of March 23, 1976. Such five branches are hereby GRANTED.

The request in branch no. 6 is not within the permissive changes in the Order of March 23, 1976 and such branch of motion is hereby DENIED.

It is so ORDERED.

/s/ CARL B. RUBIN
Carl B. Rubin
United States District Judge

M. COURT OF APPEALS' JULY 26, 1976 ORDER.

Decided and Filed July 26, 1976

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 76-1854

MARK BRINKMAN, et al.,

Plaintiffs-Appellees,

v.

JOHN J. GILLIGAN and DAYTON BOARD OF EDUCATION, et al.,

Defendants-Appellants.

APPEAL from the United States District Court for the Southern District of Ohio.

Before: PHILLIPS, Chief Judge; PECK and LIVELY, Circuit Judges.

PER CURIAM. The Dayton, Ohio Board of Education (the Board) appeals from a judgment of the district court entered on March 25, 1976 which implemented its desegregation order and judgment of December 29, 1975. This court has considered two previous appeals in this litigation and our opinions are published at 503 F.2d 684 (1974) and 518 F.2d 853 (1975). This court concluded that the desegregation order

from which the second appeal was taken (by the plaintiffs) was inadequate and we remanded the case to the district court with specific instructions, as follows:

> On remand we direct that the court adopt a systemwide plan for the 1976-77 school year that will conform to the previous mandate of this court and to the decisions of the Supreme Court in *Keyes* and *Swann*. We direct that this plan be adopted not later than December 31, 1975, so that it may be placed in effect at the beginning of the new school year in September 1976. 518 F.2d at 857.

After considering a plan proposed by the plaintiffs and one "submitted" but not "proposed" or "recommended" by the Board, the district court filed an order and a judgment on December 29, 1975. The judgment provided, in part, as follows:

> A school system composed of schools where the attendance meets the district ratio plus or minus 15% is a desegregated system as contemplated in *Keyes* v. *School District No. 1* and *Swann* v. *Charlotte Mecklenburg Board of Education*.
>
> Variations from the foregoing may be permitted in exceptional circumstances without destroying the desegregation of such systems.

The judgment also permitted high school students already enrolled at a particular school to graduate from that school regardless of attendance zone boundaries. The judgment contained guidelines to be followed "wherever possible for elementary students":

> 1. Students may attend neighborhood walk-in schools in those neighborhoods where the schools already have the approved ratio;
>
> 2. Students should be transported to the nearest available school.
>
> 3. No student should be transported for a period of

> time exceeding twenty (20) minutes, or two (2) miles, whichever is shorter.

Dr. John A. Finger, Jr. was appointed Master to establish attendance zones and a citizens board was authorized to monitor "the plan."

On March 15, 1976 the Master filed a report containing recommended desegregation plans for the elementary schools and the high schools of the Dayton system. The report contemplated achieving desegregation of the elementary schools by a combination of redefining attendance areas and the pairing of schools. Under the plan proposed for the high schools attendance zones would be the primary tool. In a judgment entered March 25, 1976 the district court adopted the portion of the Master's report dealing with the elementary schools and approved the Master's recommended zone changes. However, the Board was given the option of making annual exchanges between paired schools without a movement of teachers or semi-annual exchanges of both pupils and teachers as recommended by the Master. The judgment also permitted the Board to implement high school desegregation by employing an assignment program by specific attendance districts rather than following the Master's proposal of permitting school selection by students plus random assignments as necessary to achieve the mandated plus or minus 15% range. The court denied the Board's proposal for a three year phase-in of the elementary school plan.

The March 25 judgment contained this additional provision:

> IV FURTHER PROPOSALS: No determination herein shall be deemed to bar the submission of any other plan to this Court that would be consistent with the standards set forth in the order of December 29, 1975. The Court will at all times entertain a motion by any party for consideration of any specific procedure and approval will be freely granted so long as the restrictions above set forth are adhered to.

On appeal the Board argues that the remedy ordered by the district court exceeds the scope of the violations. It is argued that the district court has adopted a fixed percentage formula to achieve racial balance in the Dayton schools contrary to the holding of the Supreme Court in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The Board relies particularly upon the Court's statement that the constitutional requirement for school desegregation does not mean that "every school in every community must always reflect the racial composition of the school system as a whole." *Id.* at 24.

This court has previously held that the practices of the Dayton school system constituted de jure segregation, citing *Keyes* v. *School District No. 1, Denver*, 413 U.S. 189 (1973). *Brinkman*, *supra*, 518 F.2d at 854. Though this court ordered systemwide desegregation, the Board proposed no plan to achieve this mandate and made no showing of the existence of conditions related to the topography of the Dayton area, location of natural or artificial barriers, geographic isolation or similar considerations which might militate against an order requiring cross-district transportation of pupils. *Compare Goss* v. *Board of Education of Knoxville*, 482 F.2d 1044 (6th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974).

The student composition of the Dayton school system is approximately 48% black and 52% white. Application of the district court's requirement that each school's ratio be within plus or minus 15% of the racial makeup of the system will permit black enrollments at particular schools to range between 33% and 63%. Rather than establishing a fixed mathematical requirement as the Board claims it does, this formula provides a flexible basis of pupil assignment similar to that approved by the Supreme Court in *Swann, supra.* The flexibility of the district court's judgment is further illustrated by the exemption of two entire grades of high school students, the provision for variations from the plus or minus 15% requirement "in exceptional circumstances" and the options

granted the Board which permitted it to choose alternate methods of achieving desegregation rather than being required to follow in every detail the plan submitted by the Master. We view the use of mathematical ratios in this case as no more than "a useful starting point" in shaping a remedy for past discrimination. *Swann, supra,* 402 U.S. at 25.

Our conclusions are in accord with those of other courts of appeals which since *Swann* have approved desegregation plans requiring system-wide adherence, within an established percentage range, to the student racial composition of the district. *See, e.g., Morgan* v. *Kerrigan,* 530 F.2d 401 (1st Cir.), *cert. denied,* 44 U.S.L.W. 3719 (U.S. June 10, 1976); *Harrington* v. *Colquitt County Board of Education,* 460 F.2d 193 (5th Cir.), *cert. denied,* 409 U.S. 915 (1972); *United States* v. *School District of Omaha,* 521 F.2d 530 (8th Cir.), *cert. denied,* 423 U.S. 946 (1975); *Kelly* v. *Guinn,* 456 F.2d 100 (9th Cir. 1972), *cert. denied,* 413 U.S. 919 (1973); *Keyes* v. *School District No. 1, Denver,* 521 F.2d 465 (10th Cir. 1975), *cert. denied,* 423 U.S. 1066 (1976).

The Board also argues that the district court based its judgment on a misconception of the constitutional requirements for a unitary school system. In its order of December 29, 1975, which discussed the provisions contained in the separate judgment entered the same day, the district court wrote —

> . . . it is a constitutional right enforceable in the federal courts that students, irrespective of race or residence, shall share equally all facilities of a school system, both the superior and the inferior.

When considered out of context and read literally the quoted language does appear to create a right which the federal courts have never recognized. However, in the context of the order this statement appears to be nothing more than an affirmation that a system-wide desegregation plan must necessarily involve all the facilities of a school system and that pupil assignments will be made as required to eliminate the vestiges of

past discrimination without regard to the comparative quality of the various facilities. Be that as it may, the quoted language does not appear in the judgment, which is the instrument this court reviews on appeal.

At oral argument counsel for the Board contended that there is implicit in the judgment of the district court a requirement for periodic changes in the Dayton plan to maintain the required racial mix and that this violates the rule enunciated by the Supreme Court in *Pasadena City Board of Education* v. *Spangler,* — U.S. —, 44 U.S.L.W. 5114 (U.S. June 28, 1976). The short answer to this argument is that the judgment directs no changes after the 1976-77 school year. The district court did not adopt *in toto* the Master's report in which there was speculation about the necessity for future adjustments in the plan. The *Spangler* decision held that after Pasadena had established a unitary school system the district court could not require annual adjustments in attendance zones to prevent the development of racially identifiable schools within the system, where subsequent changes in the racial mix are caused by factors for which the school authorities could not be considered responsible. The judgment appealed from in the present case established the first constitutionally sufficient desegregation plan for the Dayton system. If adjustments to this plan are sought by any of the parties in future years the district court will necessarily consider the limitations of *Spangler* in dealing with such requests.

The judgment of the district court is affirmed.

III. RELEVANT RULINGS AND MOTION.

A. RULING OF TRIAL COURT MADE AT OPENING OF HEARING ON VIOLATION HELD IN NOVEMBER AND DECEMBER OF 1972.

[R. I. 1-2, Vol. 1] THE COURT: Before we commence, gentlemen, I would like to make a statement for the record and then you may make your responses. This is a limited hearing on this case and it is intended to be a preliminary inquiry. I want you gentlemen to understand if it develops in this inquiry that later hearings are necessary, they will be held. At this time however, we are going to inquire only into the question that was discussed with counsel at the pretrial hearing. We are going to inquire of whether or not acts by the School Board of Dayton have created a segregated school system.

At this time, we are not going to inquire into the questions regarding the so-called State Defendants unless there is a showing that their activities in some fashion contributed to or were acts with the School Board of Dayton.

* * *

B. MOTION OF DAYTON BOARD RELATING TO STANDING.

[R. I. 1717, Vol. 17] We would move further for a directed verdict on the ground that there has been a failure of proof that the Plaintiffs in this action are members of the class which they purportedly represent or that this action is properly maintable as a class action under Rule 23.

* * *

C. RULINGS OF TRIAL COURT MADE AT REMEDIAL HEARINGS IN DECEMBER OF 1975 AND MARCH OF 1976.

[R. III. 52-55] Q. On page 16 you make the statement about declining enrollment is common these days to schools throughout the nation. This is at the top of the page. Then you conclude that the figures just presented suggest, however, and I am not sure what you mean by however an inordinate drop in the white student population, some of which must be attributed to a continued move to the suburbs. That continued to move to the suburbs is not something that results from the desegregation order, is it?

That has been going on in Dayton for the last 20 years?

A. It was established today approximately 11,000 white youngsters and 900 black youngsters have left Dayton in the last five years.

Q. There has been a substantial out white migration in most urban centers; is that correct?

A. Yes.

Q. And that is without regard to desegregation; is that correct?

A. Yes, it has been going on. In some instances with desegregation and in some instances without.

Q. In the 20 major cities of this country, has there been any court orders bussing or pairing or clustering of schools that resulted in white out-migration in the last 20 years?

THE COURT: Mr. Lucas, assume it either way. Assume that a court order has decimated the schools, or assume it has had no effect. Of what significance is that? These are social problems that I don't really feel the Court should enter into. Whatever the effects of desegregation may be or whatever the effects of the court order, this isn't a matter of choice. We have passed the point in this case where these things are relevant.

MR. LUCAS: Your Honor, the only relevance that I possibly see, and I basically agree with the Court, is their reason

for not using pairing and clustering as I understood it was because it produces this type of phenomena, and then they cite some bogus statistics about Professor Coleman, which he since recounted, and other so-called authorities to support that proposition.

To the extent they are relying on it, I think it is significant to demonstrate the truth or falsity of the position.

THE COURT: I don't really think it is worth the time, Mr. Lucas. Would you proceed, please?

BY MR. LUCAS:

Q. In fact, Dr. Gordon, isn't that the reason why your team was told by the Board to reject the alternative of pairing and clustering?

THE COURT: I would suggest, Mr. Lucas, that you proceed to something else. I am simply not interested in this.

MR. LUCAS: Your Honor, I think it is essential that we know why the desegregation has been rejected, whether it is a good reason or bad reason.

THE COURT: Mr. Lucas, it may well be that we see these hearings in different lights. I would ask that you proceed to another matter.

BY MR. LUCAS:

Q. Dr. Gordon, why did you reject pairing and clustering?

THE COURT: Mr. Lucas, I would ask you to proceed to another matter.

MR. LUCAS: Your Honor is instructing me I may not ask —

THE COURT: Mr. Lucas, you have been instructed. Would you proceed to another matter?

MR. LUCAS: I just wanted the record to be clear.

THE COURT: I am sure the record is abundantly clear, and, Mr. Lucas, if I must tell you a third time, I will do so. Proceed to another matter.

MR. LUCAS: May I make an offer of proof?

THE COURT: You may at a recess.

MR. LUCAS: I will do that then.

• • •

[R. III. 126-131] Q. In looking at page 196, look at letter "h". The statement is made there that there are great differences in white flight among cities. No one knows the policies (local/state, etc) which help control white flight. Would you agree with that?

A. Yes, I would agree with that. I don't know of any definitive studies that would predict when white flight would occur.

Q. Do you agree the white flight concept is to some extent a self-fulfilling prophesy when school boards predict it?

A. I think that influences some, yes. How many, I don't know.

Q. Are you aware that most of the so-called white flight in the country has taken place totally without regard to school desegregation?

A. I am not aware of that, no.

Q. What studies are you familiar with about white flight?

A. Very few.

THE COURT: Mr. Lucas, let me direct a question to you. Let's assume that a plan that will meet with the requirements of the remand encourages white flight and another one that does not meet with the requirements of the remand does not. Are you suggesting this Court has any choice?

MR. LUCAS: No, sir, I am not.

THE COURT: I was unaware of it also, and I was curious about this. Assume it either way. Assume that the differing plans will accelerate or decelerate white flight. This isn't a problem for the Court, is it? Isn't the Court required to approve a plan that will desegregate the schools?

MR. LUCAS: Your Honor, I think what the Court has to measure in deciding what plan to approve or what changes to make and so forth is whether or not rejecting particular alternatives the Board has done so on a basis which is legally proper, or whether or not that rejection, the choice of a less effective or an alternative which is demonstrably capable of actually desegregating the system is based on an impermissible factor. That is what Green spoke to. It may reflect on the

intentions of the body in particular instances. So, that is the purpose of the inquiry.

THE COURT: I don't see whether or not a plan will accelerate white flight which is obviously at this point speculative at best, no one is prepared to say what will, in fact, happen, and —

MR. LUCAS: Well, the defendants have, your Honor.

THE COURT: Let me finish, please. I am just concerned about the utility. It seems to me that the choice here does not bear upon social questions. The choice here depends upon effective desegregation, and this seems to me to be a social problem, and one that the Court is not confronted with.

MR. LUCAS: I think the theorum the Court is being presented with here is that plaintiffs' plan will obviously desegregate. They have rejected using the technique that plaintiffs' plan uses to desegregate because they say, and I am not agreeing with them, but they say it will cause white flight.

THE COURT: Well, your point, Mr. Lucas, as I look upon that, is irrelevant. I look upon these plans as to whether they, in fact, desegregate the schools, and that is all that I look to.

Now, it is appearing to me at this point I have a choice between techniques, because apparently both plans will accomplish the same purpose, and if they do then I would concern myself only with those things that are judicial in nature and not those which are social in nature.

MR. LUCAS: What we are suggesting is perhaps one of the plans before the Court is not capable of a determination that it will, in fact, desegregate the schools, and that is the issue we are testing here obviously for the next period of time, if you decide we may.

THE COURT: I don't think that is the criterion. I suspect, Mr. Lucas, that a question I addressed earlier to Dr. Gordon may be the key question, and that if the Court determines what I said is the bottom line, that is what the school components will be, that is going to be the test of whether a school is desegregated if I read Swan and Keyes correctly.

Now, this I believe is really a collateral question. It might

well be this white flight could be supported by some view as being a good thing. I don't know, and I could care less. I don't see that in terms of these plans of the preferability of one over the other whether it accelerates or decelerates that condition. I don't see that as a judicial consideration.

MR. LUCAS: Your Honor, I agree that the goal, the bottom line as you expressed it, is the purpose of us being here. The question I think that has to be measured is whether or not a particular plan is calculated, reasonably calculated to lead to that goal, subject to the Swan limitations, reasonable travel time and things of that sort. I am not sure that educational soundness, whatever that may mean, is one of the criteria. Mr. Greer keeps suggesting that is one of the three criteria.

I think health, safety and welfare of the child perhaps includes that, but I think the Court is correct getting into the educational theory, what is educational and educationally sound is a judgment that the Court indeed may not make.

THE COURT: I likewise feel that social problems are judgment calls that the Court may not make. I think that may be critical to our entire view of this problem. I see this as a judicial question regarding deprivation of constitutional rights. I don't see it in terms of social goods or social evils. That simply is not for a Court to determine.

MR. LUCAS: Well, my only purpose in examining is to test their theory as to why they rejected a proven effective method of desegregating schools.

THE COURT: I am prepared to assume it either way you prefer, Mr. Lucas, either that the Board's plan will accelerate white flight or that it will decelerate it, and I am prepared to consider your plan either way, and I still come out to the conclusion that that can't be relevant to the determination.

MR. LUCAS: I am really in agreement with the Court.

THE COURT: I would assume so.

MR. LUCAS: What I am arguing is they have used an irrelevant determination to reject a valid technique. That is where I am.

THE COURT: And I am prepared to agree with that. Now, let's go forward.

MR. LUCAS: Thank you, sir.

THE COURT: I am prepared to agree that they may have, but as I say, it doesn't make much difference.

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IV. RELEVANT PORTION OF STATEMENT OF PLAINTIFFS' COUNSEL MADE AT OPENING OF HEARING ON VIOLATION HELD IN NOVEMBER AND DECEMBER OF 1972.

[R. I. 11, Vol. 1] Further, it is not in controversy in this cause that the Dayton Board of Education in December of 1971 eliminated all the boundary lines which the Court sees on that map, and that it called for the adoption, according to certain criteria, of a desegregation plan but it first voided every one of those boundary lines and that the present Dayton Board of Education on January 3, 1972, reestablished the boundaries, in effect drew boundaries for the Dayton School System which boundaries are the same which result in the patterns of segregation which are reflected in the agreement as to the statistical enrollments in the schools at that time.

But for the action of the Board on January 3, those boundaries would not exist as they exist today.

• • •

V. RELEVANT DESEGREGATION PLANS FILED WITH DISTRICT COURT.

A. PORTION OF PLAN SUBMITTED BY DAYTON BOARD IN COMPLIANCE WITH ORDER OF FEBRUARY 7, 1973.

(Title omitted in printing).

I. ELIMINATION OF OPTIONAL ZONES

A. Procedures

1. General

a. All students new to the changed district will be required to attend the newly designated school.

b. Students *may* change to the newly designated school in September, 1973.

2. High School Students

a. Students now attending high school may continue in their present school.

b. Any student who has completed the tenth grade who changes his or her address within the school district during the summer or the school year, may continue in the high school zone where originally enrolled.

3. Elementary School Students

a. Students in present grades K through five must change to newly designated district.

b. Students in present grades six and seven *may* remain in present school.

c. Any student who has completed the seventh grade in a school zone containing a K-8 school or any stu-

dent who has completed the fourth grade in a school zone containing a K-5 school who changes his or her address during the summer or the school year may continue in the school.

B. Optional Area Changes

1. Elementary

a. **Bell Haven – Ft. McKinley**

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b. **Valerie – Ft. McKinley**

° ° °

c. **Residence Park – Jane Addams**

° ° °

d. **Horace Mann – Lincoln**

° ° °

e. **Cleveland – Belmont Elementary**

° ° °

f. **Grant – Belmont Elementary**

° ° °

g. **Lewton – Eastmont**

° ° °

h. **Westwood – Jackson Schools**

° ° °

i. **Westwood – Carlson**

° ° °

j. **Carlson – Wogaman**

° ° °

k. **Highview – Wogaman**

° ° °

l. **Highview – Carlson**

° ° °

2. High School

a. **Fairview – Roth**

° ° °

b. **Belmont – Wilbur Wright**

° ° °

c. **Colonel White – Kiser**

° ° °

d. **Colonel White – Roosevelt**

° ° °

II. FREEDOM OF ENROLLMENT PRIORITIES

A. Revised Freedom of Enrollment Policy

1. Transfer Within District

The parent of a pupil in good standing enrolled in the Dayton Public School District may request assignment of the pupil to any school building within the district where space may be available to accommodate him. Such requests will be granted according to the following procedures:

a. Students residing within the attendance area of a school building shall have *first* priority to assignment to that building.

b. A student desiring enrollment in any building for whatever reason shall have *second* priority in that building providing his enrollment will contribute to improved racial balance in that building and providing that such transfer will not adversely affect the racial balance of the sending school. Schools will be considered racially balanced if they reflect the over all racial composition of the Dayton School District.

c. Students meeting the requirements for a course available only in the particu'ar building shall have *third* priority for attendance in that building and all students enrolling under this priority for the first time commencing with the 1973-74 school year and each year thereafter shall return to their home school upon completion of the course.

d. Transfer to another school within the city will be made only at the beginning of the first semester.

e. A permit to attend a school outside the attendance area of residence is valid until the end of the school year for which it is issued. It is *renewable on a year-to-year* basis depending upon availability of space in the receiving school. A student requesting renewed assignment shall have priority over new transfer requests. Students now attending a school building under the freedom of enrollment policy may continue their attendance in the assigned building where there is available classroom space without re-submitting an application. However, elementary graduates under the freedom of enrollment policy desiring a transfer for the purpose of meeting requirements for a course or improving racial balance must re-submit an application.

f. Excepting those students returning to their home schools upon completion of a course, students desiring to return to their home school district may do so at the end of the school year, unless an emergency situation arises, and will not be eligible for further free enrollment transfer.

g. An application for transfer may be obtained from the principal of the home school district or the Student Relations Office. All requests for transfer shall be mailed or delivered by the parent to the Student Relations Office for action.

h. Transportation will be the responsibility of the Board of Education for all students eligible and approved for transfer and who voluntarily transfer under Option b where racial balance is improved in the receiving school.

i. This transportation is granted on the same basis as other students being transported. Thus, elementary and middle school children who reside more than 1.5 miles from their schools of attendance, and high school students who live beyond 2 miles and are unable to obtain public transportation that will get them to the school of attendance within one hour, will be eligible.

2. Student Exchanges Within the City

a. Any two pupils, or group of pupils, attending schools within the district may voluntarily exchange places for a semester or a year if such exchange will improve the racial balance in the receiving schools and does not adversely affect the racial balance of the sending school.

b. Procedures shall be the same as for transfers as enumerated above.

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III. FACULTY ASSIGNMENT PRACTICES

Faculty assignments for each school in the Dayton Public Schools shall continue to reflect a racial composition that approximates the ratio of black to white faculty in the entire school system. The Superintendent of Schools is specifically charged with the duty of seeing that this policy is implemented.

Faculty personnel shall continue to be hired on a nondiscriminatory basis. It is the intent of the Dayton Board that every reasonable effort will be utilized to in-

sure that the percentage of black faculty, as related to the entire faculty in the system, will continue, at a minimum, at the approximate level that has existed in the system since 1970.

IV. HIRING POLICIES FOR CLASSIFIED PERSONNEL

A. Clerical, Custodial and Food Service Staff

The racial characteristic for the City of Dayton as reflected in the 1970 census tract is 31.0% black. The racial characteristic for the Dayton Public Schools is somewhat less than this since the zones embodying schools lying outside the City of Dayton are predominantly white in their racial composition.

The clerical staff of the Dayton Public Schools is currently 65% white and 35% black.

° ° °

The custodial staff of the Dayton Public Schools is currently 52% white and 48% black. The Food Service Staff presently employs 304 persons. Of these, 181 are white and 123 are black, with a ratio of 60% white and 40% black.

As for the clerical, custodial and food service employees, it is the policy of the Board that the employment of black minorities in these positions will continue to reflect the proportion of the black to white population residing within the Dayton School District.

B. Maintenance Staff

In December of 1972, the supervisor of the maintenance and transportation division, who was white, resigned. This vacancy was subsequently filled by a qualified black supervisor.

° ° °

In October of 1972, the Dayton Board of Education entered into a bargaining agreement with the Building Trades Council. A provision in this agreement created a new classification entitled "pre-apprentice trainee". Through the use of this classification, the Dayton Board resolves to integrate the maintenance staff.

Before June 15, 1973, the Board will hire five "pre-apprentice trainee" minority craft employees. Two electricians, two plumbers and one glazier will initially be employed.

Since there are presently eight maintenance craftsmen who have attained age 60 or beyond the opportunity for further minority employment will exist upon the retirement of these craftsmen. Additionally, further opportunity for minority employment will exist if the maintenance department is expanded or any existing craftsman terminates his employment with the Dayton Board.

It is the intent of the Dayton Board to integrate each union craft in the maintenance division. Every reasonable effort will be utilized to employ minority craftsmen, apprentices or "pre-apprentice trainees" in order that the black to white ratio within each craft approximates the proportion of black to white population residing within the Dayton School District.

V. SCIENCE ENVIRONMENTAL PROGRAM

° ° °

This plan proposes the establishment of a city-wide elementary science program guided by a trained staff of about 50 persons working in four centers. These staff members will be selected from the most active and innovative science teachers in the Dayton Public schools.

About 11,000 pupils in grades 5 through 8 and their teachers will make a field trip once every two weeks to a center designed and staffed to provide training and experiences as briefly described herein.

About 500 high school students will participate in the centers on a credit basis, to assist younger students in learning to use the science skills in solving problems.

Students in grades 1-4 will visit a science center once or more during the year.

A science-mobile will be used by students to simulate environments too distant to reach.

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The specific content of the program will be developed and promoted by cooperative effort of social studies and science specialists of the curriculum development department. The program will concentrate on concepts that relate to the natural environment, to the use man has made of the products of nature, and to man himself. In the program, these concepts may mingle in any one learning experience, so that the program becomes multi-disciplinary in implementation.

Children will be transported to the Environmental Centers on buses. A trained aide, speaking on an audio-equipped bus, will point out places of interest as the bus moves from the neighborhood school to the Center. Bus trips will vary for a class from time to time with routes chosen so that children may get comprehensive views of the entire city. Audio equipment on alternate backs of bus seats will encourage pupils to interact with the guides. The bus driver and the bus travel resource aide will serve as para-professionals in the course of the day's program.

Activities will vary with the grade level of pupils involved and the program planned for the day. Activities for the elementary grades will be directed toward a general ecological approach for developing environmental awareness. A multi-sensory approach will be used so that the pupil will be more "totally" involved in the activities. Trails and sites will be selected to meet the program needs which have been planned for the day.

Teachers of participating students will become part of the teaching team and will gain expertise in the ways to follow up activity in their home schools.

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The visiting students will be scheduled so as to represent a racial and socio-economic mix similar to that of the entire school district.

VI. PATTERSON-STIVERS VOCATIONAL HIGH SCHOOL

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Beginning in September of 1973 the facility presently designated as Stivers High School will be converted, over a three year period, to a co-operative vocational facility which will be known as the Stivers campus of the Patterson-Stivers Vocational High School. Ninth and most tenth grade students selected for the vocational program will be enrolled at the Stivers campus. The remaining tenth grade and all eleventh and twelfth grade vocational students will attend the Patterson campus (presently the facility housing Patterson Co-operative High School).

The students currently enrolled in grades nine through eleven at Stivers High School and the students of those classes moving into this geographical zone during such three year period will continue to attend Stivers until their respective classes graduate. As of September, 1973 all students residing within the present geographic boundaries of Stivers, with the exceptions as noted above will be assigned on an equitable and non-racial basis to Wilbur Wright and Belmont Highs Schools. The resulting realignment of the Stivers boundaries will provide for increased integration in the two receiving schools.

VII. THE MUSICAL STEREOPTICON

° ° °

The immediate objective is the formation of an elementary and high-school all-city band orchestra and chorus. Each performing group will participate in concerts and joint musical ventures with other students of similar interest and proficiency from all schools within the district.

Based upon the successful implementation of the foregoing musical groups it is proposed that the program be expanded in subsequent years to embrace additional musical involvement of students, parents, and citizens. Envisioned at the present time are combined school marching bands (with joint marching performances), joint school pep bands, rock groups, gospel choirs, jazz lab bands, and musical theater groups. The program will be expanded to add one of these groups annually over a six year period.

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Student participation in each group, will be based primarily upon ability and each group shall contain both black and white students. Prospective student members must be members of the musical group of their own school and will be selected for membership in the all-city performing group by the school director.

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VIII. INTEGRATED ATHLETICS

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1. All elementary schools having no minorities on their squads will be required to schedule league or non-league contests with schools that do have such minorities represented. All elementary principals and coaches will be apprised of plans before league organizational meetings are held in the fall of next school year. At that time this plan will be built into each league schedule.
2. Middle school principals and coaches will make up their athletic schedules. Such athletic schedules must meet the requirements set forth in paragraph 1 above. Because of location of middle schools in different parts of the city the middle school league will present a well-integrated schedule.
3. All high school league schedules will be administered from central athletic office to insure that racial isolation does not exist. In city championship meets all high schools will be entered against all other high schools.
4. Scheduling of all future invitational tournaments of any interscholastic sport will be done in a manner so that the participating schools will represent a cross section of the total Dayton community.

IX. MINORITY LANGUAGE PROGRAM.

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The purpose of a minority language program is to educate teachers and other school personnel to recognize specific legitimate linguistic differences that exist in many varieties of American English. This knowledge should aid teachers in the tasks of teaching reading and writing (in standard English) to pupils of different cultural backgrounds.

X. LIVING ARTS CENTER

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Students enrolled in the Living Arts program are self-selected. Interest, desire, enthusiasm, creative potential and a personal interview are the criteria for acceptance. During the spring semester of 1972, 843 students were enrolled in the program. Currently, the non-white enrollment approximates thirty-five per cent of the entire

enrollment. Including in-school workshops, combined programs at the center reach an average of 2,000 students per week.

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Basically, the Living Arts Center consists of five separate departments; art, creative writing, dance, and drama.

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XI. CONTROL CENTERS.

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A. Security — Rumor Control Center

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To accomplish such an educational program, an atmosphere and climate must be established within the schools which will be a supportive adjunct to the educational program. Community — school — parent involvement must become a constructive force in meeting problem situations and dispelling rumors. An organized ongoing Security-Rumor Control Center should assist in creating the climate necessary to meet the challenges of modern, universal, quality education.

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B. School Guidance Centers

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The Board of Education and staff of the Dayton Public School System are committed to providing a quality educational program for every boy and girl in the District. This philosophy includes all the children of all people, emphasizes the need to reduce school dropouts, and provides a program suited to each student's needs.

Historically, this aim has not been reached, and many students have found the school irrelevant to their needs. These students have dropped out or failed to enroll at all. In other cases economic deprivation has influenced

parents to withhold students from school. The conditions which create these problems must be attacked and the students who are being deprived of the opportunity for an education *must* be taught.

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C. Area Learning Centers

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The Learning Centers will be operated for students between the ages of thirteen through nineteen commencing with the 1974-75 school year. Young people who apply between the ages of nineteen through twenty-one, could be accepted with approval. One Center will be designated for students between the ages of thirteen through fifteen (generally grades 6th, 7th, and 8th), and the other Center will accommodate students between the ages of sixteen through nineteen and others who qualify with approval. The Centers will be for students whose parents or guardians are residents of the Dayton Public School District. The Centers are conceived to meet the individual needs of school dropouts or those deemed potential dropouts by their home school principal.

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D. Dayton Vocational School

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It is proposed that the Dayton Vocational School proposal will become a reality at the start of the 1974-75 school year. Educational training in occupational-type work is offered to suit various student needs and abilities at the Dayton Vocational School. *Coordinated Vocational Academic Education* is being provided for young men between the ages of fifteen and twenty-one, while *Vocational Rehabilitation Training* is offered for another

group composed of both young men and young women ages sixteen to twenty-one.

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B. PORTION OF PLAN SUBMITTED BY DAYTON BOARD IN COMPLIANCE WITH ORDER OF JANUARY 7, 1975.

(Title omitted in printing).

APPENDIX A

STAFFING

In 1969 the Dayton Board of Education indicated its intent to have the racial composition of the staff of each school in the district reflect the ratio of the black-white composition of the staff in the entire system. Although the goal has been attained, the Board recognizes the need for the continuance of this staffing policy. Consequently, the Board reaffirms that staffing assignments in each school will continue to reflect a racial composition that approximates the ratio of the black-white composition of the staff for the entire district.

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APPENDIX B

TEACHER IN-SERVICE

The purpose of teacher in-service as a segment of the desegregation plan is to provide training which enables teachers to work more effectively in newly desegregated situations. An estimated 200 teachers, comprising all faculty members new to the Dayton Public School District will be involved in the in-service programs. Additionally, teachers newly assigned to specific schools and those recommended by their administrators will be accommodated in accordance with space and financial limitations.

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APPENDIX C

ROOSEVELT HIGH SCHOOL

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Roosevelt students presently in the 9th, 10th, and 11th grades will be given the choice of Open Enrollment to attend the high school of their choice. These students will be given priority over any other Open Enrollment movements. Statistics indicate that if the school day is expanded from six one-hour periods to seven one-hour periods that there will be sufficient space in Dayton high schools to receive all Roosevelt students. This expansion will be done without affecting the present five period teaching day of teachers. Therefore, Roosevelt can close its doors as a comprehensive high school in June 1975.

APPENDIX D

DOWNTOWN MAGNET HIGH SCHOOL

and

SATELLITE MAGNET PROGRAMS

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The magnet high school will be located in the downtown area so that all qualified students will have easy access to the formal facilities as well as to various agencies and institutions which will be utilized by the students in the magnet schools.

The satellite magnet schools located at Dunbar and Roth were selected because of their site location and their racial composition. It is the hope of Dayton City Schools that interested and qualified students from throughout the entire district will enroll in the magnet courses and thus reduce isolation at Dunbar and Roth. Moreover, the Dunbar and Roth facilities are adequate since there is ample accommodation for an increase in the student body as well as appropriate accom-

modation at the two sites for certain specialized courses which have been identified.

The combination of the Downtown Magnet School and satellite locations at Dunbar and Roth will attract a sufficient number of students throughout the city to reflect a more representative racial composition of the City of Dayton. In order to develop an academically and vocationally enriched magnet high school for qualified students, the administration will initiate a challenging course offering program which allows students to approach their potential and to insure the best use of available educational resources.

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APPENDIX E

KISER CAREER CENTER

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Beginning in the fall of 1975, a variety of innovative vocational education programs will be implemented in the Kiser High School building. All programs will be operational by September 1976. Both new and remodeled facilities will house the programs. Programs in remodeled areas should be ready by September 1975 while those in extensively remodeled and totally new areas will be operational in September 1976.

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APPENDIX F

THE STRUCTURED ALTERNATIVE ELEMENTARY SCHOOL

The primary emphasis in this school will be on basic academic skills and subject matter, the establishment of good study habits, and improved self-image resulting from academic achievement. The school will seek to build within each child a sense of responsibility, confidence, pride in that American heritage common to all, a strong respect for law and order,

and a healthy regard and tolerance for the rights of others. The school will provide the kind of quiet and orderly environment needed by many children in order to learn.

• • •

Enrollment at SAES will be open to all students in the Dayton City Schools. The final selection process will result in an integrated student body. Selection of students will be made according to guidelines developed by the Instruction Department in cooperation with the Student Development Department. Parents who send their children to the SAES will do so entirely of their own free will and in so doing must agree to abide by the established rules and policies of the school.

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APPENDIX G

ELEMENTARY SCHOOL MAGNET PROGRAMS:

Intermediate Grade Levels

1. MODERN FOREIGN LANGUAGE

6th, 7th, 8th Grades

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In addition to offering instruction in such modern foreign languages as Spanish, German, or French, or one for which the community expresses a great deal of interest, a general language course will be offered.

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In order to implement the program, transporting students to one site would be required. Carlson School has been selected. The school day can be divided into three blocks of time allowing for up to 360 students to be served. For minimal implementation of the program six (6) foreign language teachers will be required. Students will attend the foreign language magnet on days they are not scheduled for the science centers. Foreign language will be a voluntary study option.

2. BUSINESS EDUCATION SKILLS
6th, 7th, 8th Grades

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Many middle-school age youngsters will benefit from typing and other business education subjects, if available to them. For these pupils manipulative skills will be further developed, other disciplines understood and appreciated, knowledge gained concerning careers in business and all of its related fields, and a variety to the school curriculum provided which will enhance the holding power of the educational processes.

Youngsters who select this magnet will be transported from their home schools to the magnet site on the days that they do not attend the science centers. It is anticipated that approximately 300 students can be accommodated by this magnet in three time blocks per day.

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3. CAREER MOTIVATION CENTER
4th and 5th Grades

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The basic structure of the program will give the students who elect to attend the Center the opportunity to explore four broad occupational groupings during the school year.

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During the school year students will have the opportunity to explore four occupational groups. They will spend 4 hours per week (2 — 2 hour sections) at the center. Each of the four teachers at the center will have two 2-hour classes daily, four days per week. Each class will enroll approximately 25 students. It is anticipated that the implementation year 1975-76 this center will serve approximately two hundred twenty students.

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Occupational Group Description

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Group	Sub-Clusters
	• • •
I.	Business & office
	• • •
	Marketing & Distribution
	• • •
	Communications & Media
	• • •
II.	Animal Science & Agriculture
	• • •
	Environment
	• • •
III.	Foods, Housing, and Hospitality
	• • •
	Health
	• • •
	Recreation
	• • •
IV.	Construction
	• • •
	Manufacturing
	• • •
	Transportation
	• • •

APPENDIX H

(Other Programs)

1. EXPANSION OF SCIENCE CENTER PROGRAM

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Science programs in Dayton elementary and middle schools as in other large city schools, vary widely in sophistication. Books and other curricular materials are provided; however, facilities and equipment for science teaching and learning are

minimal in most buildings. The expertise of teachers in guiding the learning of children in science ranges from imaginative and exciting to the direction of pupils in reading science textbooks.

The Dayton Board of Education acted to improve this situation through the establishment of four Science Centers in 1973. The 3,500 youngsters attending the five day Dayton middle schools were exempted from the program. It is now proposed that these children participate in the Science Centers effective September 1975.

2. SCIENCE ENVIRONMENTAL CENTER

• • •

A sustained period of students inter-racial contact involving both a structured and non-structured situation where students can freely and naturally interact.

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An outdoor camping experience proposes to provide for the establishment of an environmental program to involve all sixth grade students on a voluntary basis. A racially balanced group of approximately 60 students and their teacher will comprise one group of campers. By using two different camp sites, it is estimated that the entire 3,200 sixth graders will have the opportunity for this experience during the fall and spring sessions.

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3. ALTERNATE SCHOOL PROGRAM for INTERMEDIATE GRADE LEVEL STUDENTS

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The Dayton Public Schools like most urban school districts today has a sizable number of sixth, seventh and eighth grade students who have either become alienated from the regular school program or who are experiencing academic

and interrelational difficulties to the point that early school leaving (dropping out) will probably be the outcome. A high percentage of those who drop out of school and into the world of the unemployed and unemployable are close to the age of sixteen. Invariably school records indicate that those leaving at this time experienced little success and varying degrees of alienation in the intermediate grades.

• • •

The program will involve 150 students representative of all kindergarten through eighth grade elementary schools and middle schools in the Dayton School District. The population will reflect the same racial composition as does the total Dayton school population and efforts will be made to balance the enrollment with regard to sex and to economic backgrounds of the participants. Prospective students will initially be identified by their home school administrator but the final decision concerning prospective enrollment will be made by a committee consisting of a school psychologist, the Director of Alternative Education Programs, and the project coordinator. Prior to enrollment an applicant, along with a parent or guardian, will be interviewed by the coordinator or his designee at which time the school's program will be explained. No student will be enrolled without parental permission. Also, all students will have the right to return to their home school at the conclusion of any semester.

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4. SPECIAL NEEDS PROGRAMS

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The following magnet programs serve the whole school community:

The Daytime Center

• • •

Handicapped Programs

• • •

Intergovernmental — Summer Program with City of Dayton

* * *

VEET (Vocational Exploration, Experience, and Training)

* * *

5. ORIENTATION AND REGISTRATION CENTER

* * *

In depth in-service for orientation and registration for all student services advisors, student action advisors and counselors will be provided, as will all information concerning all programs, courses and extra curricular offerings in the Dayton School System.

6. COMPONENT FOR MONITORING DESEGREGATION

In each component reference has been made to "reflecting the existing racial composition of the school district." The current racial composition of the Dayton school district is approximately sixty per cent white and forty per cent black.

In order to establish that these goals are being met, an advisory committee under the direction of the Superintendent of Schools, will monitor and make recommendations pertinent to the implementation of the components of the desegregation plan. The committee will establish its own monitoring procedures, but will report to the Board of Education, through the Superintendent of Schools, no less than quarterly. The initial life of the committee will be for three years. After this time, if the plan has been fully implemented, the committee will be reconstructed and will monitor less vigorously and report less frequently. It is anticipated that within four years, once the plan has been fully implemented and operational, the committee will no longer be necessary, and will be phased out.

7. ELEMENTARY ATHLETICS

To implement an integrated atmosphere for seventh and eighth grade interscholastic athletics, already present in the high school interscholastic athletics, programs will move toward city-wide seventh and eighth grade competition for the 1975-76 athletic seasons.

8. METROPOLITAN EXCHANGE PROGRAM

The Board will continue to explore voluntary metropolitan integration authorized in its January 1972 resolution. The Board recommends that every school district within a 15-mile radius of Dayton have the opportunity to exchange a number of student spaces in the Dayton District for a like number of student spaces in its district.

APPENDIX I

A METROPOLITAN EDUCATIONAL CENTER FOR THE COMMUNICATION ARTS

* * *

It is proposed that an educational center for the communication arts be developed for public and non-public juniors and seniors from the greater Metropolitan Dayton area, inclusive of all of Montgomery County. Students, who are recommended by their respective high schools, will select the subject area in which they wish to gain in-depth experience and receive specialized instruction. Many high school students complete their secondary curriculum requirements in three or three and one-half years and it is during the eleventh and twelfth grades that opportunity is provided for variation in schedule and program.

* * *

The career-oriented phase of communication arts education will attract students from every school, every section of the

total community, and will represent all racial and ethnic groups; racial balance will be maintained. Classes offered during morning and afternoon hours, flexibly scheduled, will accommodate 600 or more young people who can benefit by concentrated study and skill development in this rapidly expanding career field.

C. PORTION OF PLAN SUBMITTED BY PLAINTIFFS IN COMPLIANCE WITH ORDER OF JANUARY 7, 1975.

(Title omitted in printing).

* * *

Data for the current school year for the Dayton Public Schools indicate there are 47 elementary schools (Table I) with an enrollment of 28,588 pupils, 13,164 (46 per cent) of whom are blacks. There are 5 middle schools with an enrollment of 3,537 pupils, 2,431 (68.7 per cent) of whom are blacks. Eleven high schools enroll 14,820 pupils, 6,739 (45.5 per cent) of whom are blacks.

The elementary schools display a wide range of grade organization – prekindergarten through grade 2 (1); through grade 3 (1); through grade 5 (6); and through grade 8 (11); kindergarten through grade 3 (2); through grade 5 (3); and through grade 8 (19); grades 4 through 8 (2); grades 4 through 5 (1); and grades 3 through 5 (1). Middle schools house grades 6 through 8, and the high schools grades 9 through 12.

Sixteen of the elementary schools are over 90 per cent black in enrollment; 17 are over 90 per cent white. Five secondary schools are over 90 per cent black; two are over 90 per cent white.

* * *

TENTATIVE SAMPLE FORM
FOR HIGH SCHOOL APPLICATION

Name .....

Address .....

Class you will enter in September 1976:

Freshman .... Sophomore .... Junior .... Senior ....

High school attendance zone in which you reside .....

If you are currently attending a high school, indicate which one .....

On this form you will be asked to indicate three choice of high schools for September 1976. Be sure to read carefully the material below so that you will understand how to make your choice.

1. Juniors and seniors will be allowed to continue in their present school, if they so choose.
2. Except for Belmont-Dunbar and Wilbur Wright-Roth, all students who elect to attend the school in their attendance zone are assured that they will receive that assignment.
3. Any student may request attendance at any of the schools in the city, but only a very limited number of students will receive assignments to schools outside the attendance zone of their residence.
4. Students currently enrolled at Stivers-Patterson will be able to continue at that school, if they so choose.
5. Students residing in the Roth-Wilbur Wright zone and the Belmont-Dunbar zone should understand that these four schools will be desegregated in September 1976. Obviously many students residing in those zones will be assigned a school on the opposite side of the city from where they reside. Entering freshman and sophomores will be randomly selected for these assignments until the required quotas are met. Some students or groups of

students might prefer to volunteer for their assignment because in that way groups of students could be assured of being assigned to school together. Every possible convenience will be afforded students electing or assigned to a distant school, e.g., on time express buses, late afternoon and evening activity buses, and whenever appropriate, home-to-school and school-to-home delivery.

D. PORTION OF PLAN TRANSMITTED BY DAYTON BOARD IN DECEMBER OF 1975.

2. *RTA Transportation should be utilized more extensively in light of the lower cost.* This would be especially true at the high school level. Whereas, the new desegregation plan will necessitate some increase in the numbers of students requiring transportation, RTA should be utilized almost exclusively to handle such increases. A corollary benefit would accrue if the Board owned the St. John buses. The District could then utilize RTA to the maximum; even to the point of creating special routes and inaugurating new service, which they cannot now implement because of laws governing competition from the contractual line (St. John). If the Board acquired St. John, it could utilize RTA to streamline the total transportation program. RTA routes are such that all areas of the city are covered with no location, except too remote areas, more than .4 miles from a route.

3. *The utilization of taxicabs for transportation should be eliminated.* Two primary reasons justify this recommendation.

   A. It is extremely expensive transportation for the minimal results.

   B. It tends to create highly emotional feelings on the part of Black students. They react angrily when observing White students arriving at the Roth and Dunbar magnets via taxicabs. * * *

E. REPORT OF THE MASTER JOHN A. FINGER.

(Title omitted in printing).

On December 29, 1975 the Honorable Carl B. Rubin, United States District Judge, appointed me (John A. Finger, Jr. of Providence, Rhode Island) Master in the above titled action, directing the supervision of the redistribution of students on a school by school basis, and the establishment of attendance zones under the guidelines to be followed whenever possible.

Previously the Court had appointed me as Consultant to the Court directing the School Board to provide assistance and information as requested by the Consultant.

No hearings have been held in carrying out the duties assigned to the Master. One meeting was held with the attorneys in the case to inform them of procedures and activities being followed. As Master, my activities have consisted of meeting with School Board personnel, primarily the Superintendent of Schools and his executive staff, the reading and analyzing of reports and proposals prepared for me by the Superintendent and his staff.

Dayton, Ohio, a city of 243,000 is located in southwestern Ohio, some 50 miles due north of Cincinnati. The city is located in the east central part of Montgomery County, population 610,000. The standard metropolitan area, of which Dayton is the center city, has a population of approximately 850,000.

The Dayton School District is not coterminus with the city of Dayton. Portions of Harrison Township, Madison Township, Mad River Township and the village of Riverside are included in the Dayton School District. Some portions of the city of Dayton are in the Harrison Township School District, the Jefferson Township School District, and the Mad River Local School District. Appendix A is a map showing the Dayton School District and the city of Dayton boundaries. The Dayton School District has a population of approximately 268,000 and a school population of 45,000, of which slightly

less than 50% are black. With the exception of the Trotwood-Madison District, which is approximately 25% black and Jefferson Township District which is 80% black, the school districts in the Dayton standard metropolitan area are predominantly white. Of the approximately 170,000 students in the Dayton standard metropolitan area, less than 30,000 are black. Twenty-two thousand (22,000) of these black students are in the Dayton School District.

The Court's Order of Appointment limited my activities as Master to those of supervising the School Department in the development of new attendance zones and to reporting the numbers of students to attend each school, but I would be remiss in my responsibilities if I did not include some comments about my views on Dayton and its metropolitan area.

I have been subjected to a perspective on the school in Dayton from a variety of sources, a perspective which views many black neighborhoods as undesirable, and a perspective which recognizes that some white parents will be reluctant to send children to schools in these neighborhoods because of concern for the child's social well-being and perhaps for his physical well-being as well. Each person has his own perceptions through which situations are interpreted. I am glad to be able to report that I have not seen disorganized schools in Dayton. From what I have seen, parents should not be apprehensive for their children's safety and effective education in any of the schools in Dayton.

Many people have expressed to me their concern that unless some corrective action is taken Dayton will become increasingly black. Whatever the causes, the fact is that Metropolitan Dayton is predominantly white, but within it is a sector that is predominantly black.

I have made some brief studies of the history of Ohio School Districts and the laws and regulations pertaining thereto. Because historically Ohio had a great many small school districts, procedures have been established for the elimination and consolidation of districts. According to a United States Office of Education Report on the Statistics of State School

Systems (OE, HEW, OE 20020-66) in 1931-32, there were 2043 school districts in Ohio. By 1951-52 there were 1429 and in 1965-66 there were 738. In 1975 there were 617.

There are a number of authorized procedures for changing school district boundaries. The State Agencies, the State Board of Education, the County Board of Education, the Dayton Board of Education, and other local boards of education in and near Montgomery County can initiate procedures authorized by statute of the Ohio General Assembly to alter school district boundaries. In a state where there are a number of cities with extensive racial isolation, some of which are in desegregation litigation, one would have expected the State Board of Education to be actively involved in studies of the feasibility of achieving the elimination of racial isolation through alteration of school district boundaries, especially when such studies and resultant recommendations are specifically authorized by the General Assembly, but I believe none have been recently undertaken. Given too, the consequences for the entire area of increased racial isolation in the Dayton School District, one would think that all citizens in the metropolitan area whose center is Dayton, would recognize their stake, and would seek to assure the healthy development of the metropolitan area, yet neither the local boards nor the County Board acts. Indeed the facts may be that the metropolitan area schools are withdrawing from cooperative activities with the Dayton School District because they fear involvement in a metropolitan plan.

The Court is required by the Order of the Sixth Circuit to desegregate the Dayton School District Schools by September 1976. There are, however, some additional steps that the Court might consider.

The Court could direct the State Board of Education to submit proposals for the redistricting of the Dayton School District and surrounding districts.

The Court could direct the school boards of all districts, which are in Montgomery County and possibly Greene County, too, to submit to the Court a redistricting plan which

would bring each district to not more than 30% black with a view to providing district desegregation plans in which no school would exceed 40% black.

There have been proposals made by Professor James Coleman of the University of Chicago to utilize a voucher plan as a means of desegregation. Metropolitan Dayton might be an area where such a plan would be workable as one of several desegregation procedures for the area. The Court could direct the State Board of Education or some other state agency to undertake the detailed development of such a plan and could require the cooperation of the area local boards of education.

RECOMMENDED DESEGREGATION PLAN FOR DAYTON

Introduction

A desegregation plan must first comply with the mandates of the Court which establishes the guidelines for what is to be done, but one cannot be unmindful of the magnitude of the problems which can be encountered in implementing a desegregation plan.

For a plan to work effectively means that children will receive good educational experiences, and that the schools and the city will thrive and prosper. What actually will happen in Dayton depends upon the citizens in Dayton, and what they do both individually and collectively. Desegregated schools can be healthy learning environments where children and students share their common bonds as people and citizens of Dayton. To make desegregation not the end of the world, but the beginning, requires patience and tolerance and cooperation. Children will not be harmed because they are in desegregated schools, but each child and each student needs the assurance of parents and of the community that the program can function effectively. Even with the most efficient

planning there are bound to be problems. Each person needs to exercise restraint so that problems and confrontations can be resolved, rather than be magnified and intensified.

Desegregation plans differ in the way in which students are assigned to schools. While in some cities, desegregation requires only the alteration of attendance zones, this technique is neither feasible nor fair when the black and white communities are isolated from each other. For most of the elementary schools and for some of the high schools, there does not seem to be an alternative, except to pair schools.

Once the decision to use pairing has been made, several alternatives are available as to the method of assigning students to schools. A frequently used method is the grade assignment plan. In this procedure two paired schools, one in a white residential area and one in a black or minority residential area, serve different grade level students. One school might enroll only students in grades 1 through 3, and the other school in the pair enroll only students in grades 4 through 6. A slight alteration of grade assignment pairings would be to develop a new grade level organization such as 1-5, 6-8, 9-12 or 1-4, 5-8, 9-12, and select the schools to serve grades 5-8 so that all are located in one or the other of the black and white communities. To avoid having the younger children of one or the other communities being always the group bused away from their residential area, a city might be zoned into three or four large districts with the elementary schools (grades 1-4) being on one side of the city in one district and on the other side in another district. Where there are geographic barriers defining such districts such a procedure is most workable, for otherwise citizens residing in close proximity to each other would experience differing treatment. Some might have their elementary school children bused away from their residential area for four years, while others would have their middle school children (grades 5-8) attending school away from their residential area.

There seems to be widespread agreement among the administrative staff of the Dayton Board of Education that the

grade structure should be uniform with every elementary school serving grades K-8, and high schools enrolling grades 9-12. While some citizens might disagree with that decision, preferring to continue with the middle school organization, I have felt it inappropriate to not allow such decisions to be made by those responsible for the educational programs.

One provision of the Court Order indicated that children were not to ride school buses for more than twenty minutes, nor to be bused a distance greater than two miles, if it was possible to achieve this and still comply with the requirement of desegregation of the schools.

These suggested Court Guidelines cannot be met. Wherever feasible, schools have been desegregated by restructuring attendance zones so as to comply with the suggested Guidelines and so as to reduce transportation. Some paired schools are in close proximity to each other and the distances and travel times are within the suggested Guideline. Some paired schools are more than five miles apart. However, distance probably is not as important a criterion as time of travel. Despite the large distances separating some school pairs, the longest travel time should not much exceed twenty minutes. The School Board through its administrative staff should make every effort to minimize travel time and to provide maximum comfort and convenience for students.

Elementary School Pairing Plan

The plan for Dayton utilizes a unique method of pairing elementary schools. While some elementary schools in Dayton are to be desegregated by redefining attendance areas, others will be paired. In the paired schools each child will spend one-half of each year in the school near home, and the other half of the year in the other school. Thus, every child will be a member of two schools. The child will not change classmates nor teachers, but will at the middle of the year change buildings.

The advantages to this method of pairing are:

1. The child remains with the same teacher and classmates throughout the year.
2. Every child, teacher, and parent is involved in bringing unity to the two schools.
3. The procedure is fair to each person and each group without requiring an extensive system of keeping track of which child has been assigned a school away from home a previous year.
4. Parents of paired schools can work together to assure the maintenance of quality education, with all sharing concern for both schools. Some might construe as a disadvantage to this method of pairing the fact that teachers must change buildings at midsemester. Undoubtedly, this will be an inconvenience to teachers, but this inconvenience should be outweighed by the advantages of bringing the two paired schools together as a single unit.

The pairings will operate in this way:

1. During the summer or prior to the close of school this year, teachers and principals in the paired schools will decide which teachers will be assigned to the two schools in a pair. They will select the students who will make up each class.
2. When schools open in September, students will report to the school in their attendance zone. There will probably be a few days during which children stay in that school while the children are being selected for the desegregated classes.
3. One-half of the children in every paired school will be assigned to the paired school not in their attendance zone. When the program starts, the children will leave that school and go to the other school in the pair.
4. When they arrive they will meet the other half of their

classmates and their teacher whom they will be with for the year.

5. Bus routes will be established so that travel time between schools will be as short as possible. In some attendance zones all children will walk to their school and the buses run from school to school, but where it will be more convenient, pick up points will be established so that children will not have to first walk to school.

6. At midyear, the schools will close for a few days while teachers and some supporting staff move from one paired school to the other. When schools reopen, those students who had been attending the school in their attendance zone will go to the other paired school and vice versa. Their teacher and their classmates will be in that school.

Pairing Involving More Than Two Schools.

In some instances two schools are paired with one school. This arrangement does not alter the experiences of individual children or classes, for the children involved remain members of two schools. Where one school is paired with two schools, the administrative staff (principals and teachers) in devising the classes should select children so that for the most part, the children residing in the same geographic area are assigned to the same one of the paired schools. This does not require precisely defined zones. It rather is an informal arrangement so that neighbors in a geographic area have all of their children in the same two schools.

With but one exception in the paired schools, each school of the pair is almost exclusively one race or the other. Where there are but a few children of the opposite race in the predominantly one-race schools, those children are to be included in the pairing arrangement. The one exception is the Van Cleve district. The Van Cleve School is to be a dual function

school. One part of the school will be an integrated school that does not participate in the pairing. This part of the school will enroll approximately 350 students, half white, half black. The other part will participate in the pairing with Residence Park. The School Board may either rotate the white students on a yearly basis who are assigned to the integrated part or define a sub-attendance zone in the Van Cleve district, in which an integrated population resides and assign those students to the part of the Van Cleve School which does not participate in the pairing. If there are other similar situations, or if others develop, the above procedure should be followed.

SCHOOL ASSIGNMENTS

Northern Region

1. Many of the attendance zones in the northern region have been redefined. A Cornell Heights zone includes part of Fairport, Fairview, Jefferson, and Gardendale. Some of Jefferson is not in the northern district. Some of Jefferson is zoned to Fairview. Some of Hickorydale and Gettysburg is zoned to Belle Haven. The attached map defines the new attendance zones.

2. **Paired Schools:**

   Cornell Heights – Meadowdale
   Brown – Jefferson
   Shiloh – Fairport
   Loos – Fairport
   Gardendale – Valerie

3. **Schools desegregated by zone changes:**

   Belle Haven
   Fairview
   Hickorydale
   Gettysburg

Central Region

1. An extended zone including parts of Jefferson and Van Cleve has been defined for McGuffey, Webster, and Allen. A MacFarlane zone has been defined encompassing parts of Weaver and Edison. Weaver is to be closed. The attached map defines the new attendance zones.

2. **Paired Schools:**
   Huffman – Jackson
   Franklin – Edison
   Lincoln – MacFarlane
   Washington – MacFarlane
   Residence Park – Van Cleve
   Residence Park – Kemp
   Orville Wright – Westwood-McNary
   Ruskin – Westwood-McNary

3. **Schools Desegregated by Zone Changes:**
   Allen, Webster, McGuffy.
   An area formerly in the Jefferson zone is included with Allen, Webster and McGuffey. The School Department will assign these students so that each of the schools will enroll approximately the same proportion of black students. Some black students now attending McGuffey will be reassigned to Webster or Allen.

Southern Region

1. Irving area is rezoned. The Irving School is closed and the students assigned to the Whittier School.

2. **Paired Schools:**
   Grant – Carlson
   Drevel – Jane Addams
   Troy – Belmont
   Troy – Horace Mann
   Troy – Eastmont

Emerson – Whittier
Patterson – Whittier
Lewton – Highview
Cleveland – Wogaman

PROJECTED ENROLLMENTS

Northern Region

	Number of Students	% Black
Cornell Heights – Meadowdale	1250	53%
Brown – Jefferson	1750	51%
Shiloh – Fairport	700	45%
Loos – Fairport	800	45%
Gardendale – Valerie	625	54%
Belle Haven	825	42%
Fairview	750	45%
Hickorydale	325	51%
Gettysburg	425	55%

Central Region

	Number of Students	% Black
Huffman – Jackson	1025	50%
Franklin – Edison	1100	43%
Lincoln – MacFarlane	1300	49%
Washington – MacFarlane	625	49%
Residence Park – Van Cleve	1100	47%
Residence Park – Kemp	900	47%
Orville Wright – Westwood	900	47%
Ruskin – Westwood-McNary	1100	51%
Allen	900	44%
Webster	850	44%
McGuffey	425	44%

Southern Region

Grant – Carlson	800	48%
Drexel – Jane Addams	850	45%
Troy – Belmont	800	44%

Troy – Horace Mann	325	44%
Troy – Eastmont	775	44%
Emerson – Whittier	725	50%
Patterson – Whittier	725	50%
Lewton – Highview	575	49%
Wogaman – Cleveland	1675	47%

Note: Some of the facilities at Miami Chapel or another nearby school may be utilized in addition to the Troy Elementary School

Special Programs and Schools

Handicapped and Special Education Programs

Programs for handicapped students and special education programs as well as the Occupational Work Adjustment and Alternate Middle School programs will remain in their present locations or be relocated at the discretion of the Board of Education. Students assigned to these programs need not be involved in pairing. Kindergarten students will attend the school in their attendance zone or will be assigned to other nearby schools at the discretion of the Board of Education.

Magnet Schools

Miami Chapel will continue as an open enrollment magnet school with a specialized structured curriculum.

Longfellow will be an elementary school serving grades 1-8 or other grades if the Board of Education deems that appropriate. Longfellow will have a special Individual Guided Educational Program.

Any elementary level student is eligible to attend either of these schools. The Board of Education should try to accommodate requests for enrollment in these schools. However, the Board is not required to run an extensive transportation network to honor all requests, nor is the Board to allow the basic pairing structure of the desegregation plan to be come imbalanced because of enrollment in these schools. The target

population for school enrollments should be 50% black and 50% white, but the Board may allow additional enrollment within the Court Guidelines. Additional open enrollment magnet schools may be operated if applications so warrant, but these are subject to the above strictures.

Magnet Programs for Grades 6, 7 and 8

In the current school year a number of middle schools are in operation. Students not attending middle schools are presently allowed to elect the magnet programs so that they have a considerable amount of choice available to them which pro.ides a diversity of programs.

The onset of desegregation during the 1976-77 school year creates some difficulties with these magnet programs because the students being bused between paired schools would be bused again to attend magnet programs. Arranging transportation so that students would attend a magnet program on the way to or on the way home from a paired school could partially but not completely alleviate this problem. With the upper elementary grades, grades 6, 7 and 8 being assigned to elementary schools, rather than larger unit middle schools or junior high schools as is the usual practice elsewhere, some special provisions need to be made for this group of students.

The school administrative staff has not yet completed its plans for the location and operation of its magnet programs. These programs will continue and be so located as to minimize transportation and provide convenient program availability for all students.

RECOMMENDED DESEGREGATION PLAN FOR HIGH SCHOOLS

The Dayton administrative staff acting under my direction has submitted some suggestions to me for the high schools. Especially endorsed and commended are their proposals to continue the Alternate Learning Center, the Downtown Mag-

net High School, the Job Training Center, the Kiser Career Programs, and the Citywide Cooperative Programs at Stivers-Patterson. The proposal to create a Metropolitan Education Center for the Communication Arts (MECCA) is an excellent one. I have reviewed that proposal in considerable detail and believe it is truly an innovative and valuable project. Funding for this project is only partially assured. Since this would be a school to serve Metropolitan Dayton, I recommend that the Court direct the County Boards of Education of Montgomery and Greene Counties, the State Board of Education and the Dayton Board of Education to jointly prepare a proposal for the funding and implementation of MECCA.

The Dayton Board of Education has initiated programs in Computer Technology at Dunbar High School and Communication and Mass Media at Roth High School. These programs have not attracted many students, in part because they have been phased in during the current school year. In the long run the desegregation of Roth, Dunbar, Belmont, and Wilbur Wright high schools will depend upon these schools providing meaningful and effective programs for all students and upon specialized programs being offered in these schools which will attract diverse populations to them.

The Dayton Board of Education should prepare and submit a plan for locating more unique and specialized programs in these four high schools so that students can make meaningful selections among these schools.

While it may not be possible to effectuate much program change by September 1976, the Board should develop long-term and short-term program strategies for these schools.

The recommended plan for desegregating the high schools in Dayton primarily utilizes attendance zones, but a rather involved procedure must be established because there are exceptions to the general rule that students will attend the high school in their attendance zone.

The exceptions are:

a. Students who will be juniors or seniors in September 1976 may continue in their present high school.
b. Students may apply to the non-zoned schools, which are Stivers-Patterson, and Kiser (grades 11 and 12).
c. Some students in the Dunbar Zone are to be assigned to Belmont, some in Belmont assigned to Dunbar, some in Wilbur Wright assigned to Roth and some in Roth assigned to Wilbur Wright.
d. Some transfers to high schools outside a student's attendance zone may be permitted when the transfer aids desegregation.

There have been extensive discussions with the school administrative staff as to the procedure to be followed in assigning students to Dunbar-Belmont and Wilbur Wright-Roth. One proposal was to sub-divide each of the attendance zones of Belmont, Roth, Dunbar and Wilbur Wright high schools into two parts, an A Zone and a B Zone, and in alternate years to assign students on a rotating basis from these sub-zones to one or the other of the paired high schools. Even though it fulfiills the Order of the Court this sub-zoning procedure of the administrative proposal has some shortcomings, the most serious of which is that it reassigns more students than is necessary.

My recommendation is for a procedure that would have all students be given choices of high schools. These choices would be accommodated, where possible. When the choice could no longer be accommodated, students would be selected randomly for their assignment. This selection procedure would be repeated each year, but students entering their senior year in a high school would have the right to continue in the school they attended the previous year. This procedure seems to me to be fairer to individual students, and to gradually allow specialized programs to be developed, which would attract

an integrated student body to the currently segregated high schools.

Obviously in the coming year many students in the Belmont-Dunbar zone and in the Roth-Wilbur Wright zone will be required to attend the more distant school, for it seems unlikely that sufficient students will choose schools in the proportions that meet the Court Guidelines. There could be considerable voluntary choice for the more distant school since students or groups of students might prefer to volunteer, and thereby be assured that present groups of friends are not broken up by a random selection process.

The number of students to be reassigned would be as follows:

	Entering 9th Grade	Entering 10th Grade
From Belmont to Dunbar	225	225
From Dunbar to Belmont	150	150
From Wilbur Wright to Roth	200	150
From Roth to Wilbur Wright	125	125

The procedure for establishing high school attendance is further clarified in the following pages, which consist of a preliminary sample form which would be completed by all students, who will be in high school in September 1976. The sample form is tentative for it needs careful examination by the school administrative staff to assure that all contingencies have been included. The School Board, not the Court, would provide the assurances of transportation efficiency and convenience indicated on the sample form.

The procedure of random selection of students does not exclude the possibility of assignment by geographic areas. After students have made their choices of high schools and the assignments have been made based on these choices, the School Board administrative staff could determine the number of students which must be reassigned between Dunbar-Belmont and Wilbur Wright-Roth. They could then define an area, several areas, or a number of small areas containing

the proper number of students and the students residing in these areas would be reassigned.

If you reside in the Roth, Wilbur Wright, Belmont or Dunbar zone and you *volunteer* for an assignment to the more distant school, you will be making a commitment for only one year. At the end of the year you may request a different assignment. In that case your name would be placed in the random assignment pool. If your name is drawn, you would continue at the more distant school. Those who for September 1976 are randomly selected for assignment at the more distant school will have that as a permanent high school assignment.

Please complete the remainder of this form.

If you are currently enrolled in a high school, do you wish to continue in that school? Yes ..... No .....

Irrespective of how you responded above, please indicate your choices of high schools below.

My first choice is .....
My second choice is .....
My third choice is .....

PROJECTED ENROLLMENTS FOR HIGH SCHOOLS
SEPTEMBER 1976

	Total Enrollment	% Black
Belmont	2100	23%
Dunbar	1400	68%
Fairview	1000	54%
Kiser	900	35%
Meadowdale	1900	47%
Roth	1250	78%
Stivers-Patterson	2800	55%
Colonel White	1300	65%
Wilbur Wright	1550	32%

Note: The Freshman and Sophomore classes at Belmont, Dunbar, Roth and Wilbur Wright will have the following estimated enrollments:

	Total Enrollment	% Black
Belmont	1150	34%
Dunbar	800	44%
Roth	575	47%
Wilbur Wright	900	40%

ADDITIONAL CONSIDERATIONS AND RECOMMENDATIONS

Transportation

An efficient transportation system is very important to assure the effectiveness of desegregation. Long, crowded bus rides, late buses, or lack of buses for after-school activities, create discontent which may be directed at the Court or desegregation rather than at an inefficient transportation network. Students are entitled to as much convenience as can possibly be afforded them. Students should not be penalized by inability to attend after-school activities because of new school assignments.

The School Board should complete a preliminary transportation plan as soon as feasible reporting their overall plan to the Court in sufficient detail to show whether sufficient buses are available to provide the needed transportation.

Safety of Students

The School Board should work with law enforcement agencies to prepare contingency plans to assure the safety of all students. The School Board should informally describe to the Court their progress in developing contingency plans assuring themselves and the Court that law enforcement officers are adequately briefed and trained.

Training of Teachers

The School Board is to make certain that all teachers are adequately prepared to deal with the new situations which will be encountered. If there are special problems in training teachers for the desegregation program which warrant the Court's consideration, it should be informed of the needs and problems and of the possible ways in which resolutions can be effectuated.

Continuation of Services to Students

Federal funding regulations under Title I sometimes result in individual students losing eligibility for special services. The School Board should make every effort to see that students are in no way deprived of services as a result of their reassignments. The Court should be informed if there is an inability to provide needed services, indicating what steps needs to be taken.

Funding for Desegregation

Throughout the nation, urban centers tend to have higher tax rates than surrounding areas. The problem of providing adequate funding for all services, including education, becomes exacerbated when the tax base of cities erodes. Dayton is no exception to what seems to be the general rule of higher city taxes. Intervention in this problem is difficult, but the Court needs to be continually apprised of the funding situation. The Board of Education has made applications for federal funds and seems assured that sizable funds will be available. However, like other governmental agencies, the Dayton Board of Education has a limitation on the availability of contingency funds of the kind necessary to support the specialized services which are needed in carrying out school desegregation. A successful educational program in Dayton is essential to assure citizen satisfaction. The Court may wish to request regular reporting by the School Board on its financial condition.

VI. RELEVANT PARTS OF THE RECORD OF THE TWENTY VOLUMES TRANSCRIBED DURING THE VIOLATION HEARING HELD IN DISTRICT COURT IN NOVEMBER AND DECEMBER OF 1972 (R. I.).

A. TESTIMONY OF HUBERT D. POORE.

1. Commentary of Trial Court and plaintiffs' counsel.

* * *

[R. I. 148, Vol. 2] MR. DIAMOND: Your Honor, let me make two points clear. First of all, in at least – there are four project applications. In at least three of them there is a statement by the DMHA of the availability of space and the accommodation of nearby schools, schools in the area, or the need for new school capacity to serve these projects.

Earlier in the day I introduced into evidence and read to your Honor the statements by the Dayton School Authorities in relationship to other projects in those instances, not necessarily related to these four particular projects, of their creation of new schools and classrooms to serve the pupils of these populations of these projects.

THE COURT: Mr. Diamond, I am aware that for a substantial period of time so-called public housing, financed by agencies of both the Federal Government and local Government, were specifically designated, some were white and some were black. This is insufficient for our purposes.

If you wish to present this evidence as to these projects, I am sure that it will state therein for whom the occupancy was intended.

* * *

[R. I. 160, Vol. 2] [The Court] Mr. Diamond, you simply have not passed the first hurdle with this witness, and until and unless you do the Court is going to rule that this is not admissible.

Now, if you have a necessity with this witness and other

witnesses demonstrating some participation by the school board, unless that participation in the determination of the character, the occupancy of these projects, until that is established I am going to hold he may not testify.

MR. DIAMOND: Well, I guess what I am having difficulty understanding, Your Honor, is that in terms of a lease agreement the school authorities are the ones that made the lease.

THE COURT: There is no question about that.

MR. DIAMOND: They are the ones who said we are going to lease that space and make it either a black school or a white school.

THE COURT: Well –

MR. DIAMOND: They are the ones who made the agreement.

THE COURT: Mr. Diamond, until you can establish that the School Board participated in some fashion with the original determination that this would be a white or black project, whatever else the Board might have done, they have taken the area as they found it. * * *

[R. I. 202-203, Vol. 3] MR. DIAMOND: Well, Your Honor, what I was going to show through this witness is that he is a parent of a child, he had a family when he moved here, and I was going to ask him from his recollection about specific incidents relating to his school children and neighbors.

THE COURT: This witness has been called as an expert to testify as to policies and I have permitted that. I am not going to permit his testimony as to individual recollections going on 27 years ago.

You may be seated, Mr. Greer.

MR. DIAMOND: Your Honor, Mr. Poore would testify to the fact that there were white children transported from the Wogaman School attendance area to the Jackson School attendance area in the 1945 school year.

* * *

2. Poore testimony.

* * *

[R. I. 152, Vol. 2] "Question: Mr. Poore, what do those four applications represent in terms of the racial identification, first of all, of the projects? Let's take particularly the DeSoto Bass project where you were located in 1945 when you came on."

A. Well, the proposed Metropolitan Housing Plan, it says the project proposed for race or national group was Negro; and this project, in addition to the present, Negro occupied, which was OH-52, which we had 200 units already there.

Q. Now, to your knowledge, Mr. Poore, while you were at the DeSoto Bass project, were your projects – while you were at DeSoto Bass, were they used for School purposes?

A. Yes, they were.

* * *

[R. I. 156, Vol. 2] Q. With reference to the other project applications in addition to this DeSota, do they show the intended racial occupancy of the project?

A. Yes, they do.

Q. And could you in each instance describe what the intended racial occupancy was?

A. Summit Court is for white; Edgewood Court was for white; and Parkside Homes was for white.

Q. With reference to Edgewood and Summit, do those documents reveal the racial composition of the particular spot upon which the project was to be located and from which people would have to be removed?

A. Yes, it did.

* * *

[R. I. 183, Vol. 3] A. 143D is surveys of the colored population of Dayton; there is the colored population, the census, and the number of units in DeSoto Bass Court and the temporary housing, which was known as War housing.

For instance, there was 200 for the DeSoto Bass Courts, but

the addition of 200 was for the temporary addition. 60 for the second addition to DeSoto Bass Courts, 160 of the Homeview Courts, and 80 for Lakeview, 50 for the dormitory at Phyllis Wheatley and 100 additional dormitory for girls.

Q. Were all these projects designated for black occupancy?

A. Those were designated for black.

* * *

[R. I. 184-185, Vol. 3] A. G? This is data on the War housing application for the past six months, which is dated November 5, 1945. It gives the number of white applications, excluding Vandalia, and then it gives the number of applications for the Vandalia area, the number of Negro applications.

Q. Why is it divided into those three columns?

A. Well, all the white applications except Vandalia were filed in an office downtown, and the black applications were all filed at the DeSoto Bass Courts, and Vandalia homes, which was located in Vandalia, that they made application there.

Q. Was Vandalia homes a white project?

A. Yes, it was.

* * *

[R. I. 187-188, Vol. 3] Q. Does PX-143J include lease agreements with the Dayton Board of Education?

A. Yes, it does.

Q. And were lease agreements made for space in the DeSoto Bass and the McGuffey Homes?

A. Yes, it does.

Q. Now, what was the racial designation of the McGuffey Homes?

A. It was white.

Q. And DeSoto Bass?

A. Black.

Q. Now, when you were – was it Executive Director of the DeSoto Bass Courts?

A. I was Project Manager.

Q. Project Manager, excuse me. I am sorry. I got the language wrong.

Q. When you were project manager at the DeSoto Bass Courts, when these lease agreements were in effect, were black pupils and black faculty assigned to that leased space?

A. Yes, there was.

* * *

[R. I. 213-215, Vol. 3] Q. Mr. Poore during the period of these lease agreements with the DMHA to use the building for school purposes, the DMHA didn't control or influence the assignment of pupils or faculty, did they?

A. No, they did not.

Q. That was within the control of the Dayton School Authorities?

A. That's right.

Q. On the lease agreement that Mr. Greer just referred to, did you find a copy of that?

A. Yes, I found a copy.

Q. And what form is that? Does it have a form number on it at the very top?

A. That's SP1913.

Q. And would you read the first line of that, the underlined portion of the heading of the lease agreement?

A. At the very top, you mean?

Q. Yes.

A. "Lease or tenant activity and other non-commercial use on Federal War Housing Projects by Federal local authorities."

Q. And is that a form by either the Federal or State authorities? I am speaking of the Federal Housing Authority.

A. I would say it is probably Federal. I am not for certain.

Q. And at that time War housing was required to be segregated on a racial basis?

A. Yes, it was.

* * *

B. TESTIMONY OF RUTH ANNETTE WILLIAMS.

[R. I. 215, Vol. 3] Q. Would you state your name, please?

A. Ruth Annette Williams.

Q. Would you state when you first arrived in Dayton and became an employee of the Dayton Metropolitan Housing Authority?

A. In early 1942.

* * *

C. TESTIMONY OF HOMER ROYER.

* * *

[R. I. 229, Vol. 3] Q. Do you recall telling the HEW team that investigated the school system that one of the reasons for putting black teachers on substitute status at first was because of the questionable nature of some of their qualifications because of graduation from southern institutions?

A. I don't remember making that statement. I may have made it.

Q. Would it be true?

A. There would be some institutions about which we had little information.

* * *

D. TESTIMONY OF PHYLLIS B. GREER.

* * *

[R. I. 348, Vol. 4] A. Well, I remember that in the '30's youngsters were being bussed from Shawn Acres to Garfield School, so it would have to have been prior to that time, sometime prior to that.

Q. And the youngsters who were being bussed to the Garfield School, were they black or white?

A. They were all black.

Q. And was the Garfield School a black school or white school?

A. Black.

Q. Do you know what school they would have attended had they attended the school zone in which the school was located?

A. No, I don't remember the closest school to Shawn Acres.

° ° °

[R. I. 476, Vol. 5] Q. Now, when your testimony ended, I believe you were at the map showing the Judge where the Garfield School was with relationship to the transportation of Shawn Acres.

° ° °

Q. What was Shawn Acres?

A. Shawn Acres was a Children's Home.

Q. And did it have both black and white pupils?

A. Yes.

Q. Now, could you step to the map with the Court's permission and show the Court where the black pupils went to school?

A. Yes.

° ° °

THE WITNESS: Shawn Acres is located up in the area of Loos School and the students from Shawn Acres were bussed to Garfield School which is three blocks from McFarlane School on Fifth Street.

° ° °

[R. I. 481-494, Vol. 5] A. (Continuing.) I was a student at Roosevelt those three years prior. Blacks were not allowed to go into the swimming pools, blacks had separate showers, so we requested from our parents to be allowed to go to Dunbar.

One of the assistant principals at Roosevelt at that time came to our home and asked that we not be permitted to go

to Dunbar because they wanted all the nice colored children to stay at Roosevelt, but we did go to Dunbar.

Q. And why did you go to Dunbar?

A. I went to Dunbar because I felt that if there was going to be — if we were going to be separated by anything, we might as well be separated by an entire building as to be separated by practices.

In fact, when I went to an eighth grade social studies class I was told by a teacher, whose name I still remember, I won't quote it but if I am asked to I will, that even though I was a good student I was not to sit in the front of the class because most of the colored kids sat in the back.

Q. Now, Mrs. Greer, while you were at the Dunbar High School, in terms of a separate building, were there other types of separation from the rest of the school system?

A. Well, when I went there in 1933, and certainly when I graduated in 1936 and when I went back to teaching in 1940, our athletic teams did not compete with the white schools in the city. Our athletic teams competed with other schools out of the state, even, that were black.

Q. Now, when you first — after you finished college — where did you go to college?

A. I went to Wilburforce University from '36 to '40.

Q. And when you returned to the Dayton Public Schools where were you assigned?

A. Dunbar High School.

Q. And at the time of your assignment were there any black teachers teaching white pupils?

A. No.

Q. And how long did you remain at Dunbar?

A. I remained at Dunbar from '40 to '45.

Q. Now, during that period of time, around 1945, are you personally aware of the faculty assignment that took place at the Wogaman School?

A. Yes, I am.

Q. What was that?

A. When school closed in June of 1945, there was an entire white staff at Wogaman. When school opened in September of '45, there was an entire black staff at Wogaman under a black principal, Robert Braxton.

Q. And at the same time were white pupils who lived in the Wogaman area transferred by bus out of the Wogaman School?

A. Yes.

Q. And where did they attend school?

A. They attended Jackson School.

Q. So that in the 1945 school year, '45-'46 school year, Wogaman had an all-black staff and all-black pupil population?

A. Yes.

Q. Now, while you were at Dunbar were black youngsters ever transferred there from Roosevelt?

A. Yes. I taught several black youngsters who had been behavior problems at Roosevelt and their parents, upon enrolling them in the school, —

• • •

Q. Would you state —

A. The disruptive black students from Roosevelt were assigned to Dunbar.

Q. And, to your knowledge, were any of these disruptive black students assigned to any other high school in the system?

A. Not to my knowledge. I could not verify that or deny it.

Q. Now, when did you leave the Dunbar School as a faculty member?

A. I left Dunbar School on maternity leave in '46.

Q. And what happened after you returned from your maternity leave?

A. We had to have two years. When I went back and asked to get the job — I was told when I left that the teacher assigned to teach English in my place would be on a permanent substitute basis. When I went back the teacher had been assigned as a regular classroom teacher. I was told that

there were no English spots in Dunbar, there were no French classes in Dunbar that I could fill in, and was asked to go to Willard School to teach on a temporary certificate until there was an opening at Dunbar in English or French.

Q. And at that time you had a high school certificate in English?

A. Yes.

Q. And French?

A. Yes.

THE COURT: Excuse me. Mrs. Greer, how long had you taught at that point?

THE WITNESS: I had taught from '40 to '49.

THE COURT: Didn't you have tenure?

THE WITNESS: Yes, but I was not really assigned to the school in which I — I was given a job. I was assured a job.

THE COURT: All right. Thank you.

BY MR. DIAMOND:

Q. And you were assigned to what school?

A. Willard.

Q. And that was in an elementary capacity?

A. Yes.

Q. And what grades did you teach at that school?

A. I had a fourth year class of students who — they had taken an overflow of students from DeSoto Bass Courts, who came from DeSoto Bass to Willard to school. There was an overflow at that time from DeSoto Bass and those youngsters were — one of those classes was the class I taught at Willard.

Q. What schools was the Willard School closest to?

A. At that point in time, I am not sure because Miami Chapel had not been built. It was the closest school at that point in time to Wogaman, but there were other schools equal distance or closer, one school.

Q. All right. Thank you.

Now, Mrs. Greer, have you on various occasions both for HEW investigations and for investigations by Dr. Carle, and on requests by Plaintiffs examined the faculty directories from your own personal knowledge?

A. Yes. I was asked to do that by Title 6 Office the first time.

Q. At that point in time what was your position in the school system?

A. I was working at that point in time with the Office of EEO, the final months of the Office of EEO.

Q. And from your examination of these faculty directories, can you state from the beginning and describe the pattern of faculty assignments?

A. Yes. The first directory that was available is a 1921-22 directory. At that point in time there were seven black teachers in the Dayton School District. All of these teachers were assigned at Garfield.

From '31 to — from '21 to '31 the number had grown to 10 black teachers.

Q. And where were they assigned?

A. They were at Garfield and one black teacher, other than Garfield, a teacher, Maude Walker, was assigned to Weaver but she had an un-graded class and she had an ungraded class of all black boys.

Then in 1933 there was then again the largest number of blacks hired and these teachers were hired as staff people for Dunbar High School.

In 1950 or '51 a teacher was assigned, a black teacher was assigned to Weaver School.

In 1955 two black teachers were assigned to Jackson School.

Q. Now, let me interrupt you one moment. You have testified about the racial change both in terms of pupils and teachers at the Wogaman School.

Now, could you describe for me the racial change in teachers at the Garfield and Willard Schools in the mid-1930's?

A. In 1934-35 these directories show there were 10 black teachers and six whites at Willard School. And then in '35-'36 that staff became all black.

The next year, '36-37, there were roughly 38 percent white teachers at Garfield and —

THE COURT: I am sorry. What —

THE WITNESS: '35-36.

THE COURT: Excuse me. 38 percent white teachers?

THE WITNESS: There were 38 percent black teachers.

THE COURT: Black. Thank you.

A. And then the year '35-36, that staff became all black.

Q. And during those same periods of time did the pupil populations become all black?

A. Yes.

Q. At these two schools?

A. Yes.

Q. Fine. Now, could you continue through? We were at 1951 and we had teachers assigned to Jackson in terms of black teachers assigned to the Jackson School.

A. Yes. There was from that time on gradual assignments of black teachers in schools that had some white students in them. However, in going through our directories we found that these black teachers were assigned to schools that were already becoming black as far as the elementary grades are concerned.

I think that we were able to substantiate that in 1955 a black teacher was assigned — a black high school teacher was assigned in a school where it was not completely black.

Q. Now, Mrs. Greer, could you look at Plaintiffs' Exhibit 130D, it is the 1960 school year.

Now, during this period of time, from the early 1960's through 1968, am I understanding you correctly that you think black teachers disproportionately were being assigned to black schools while at the same time schools with black pupil populations in terms that they were beginning to increase or had increased in black pupil population and white teachers were being assigned disproportionately to virtually all white pupil populations?

A. As I look at Exhibit 130D, this indicates that that was the case. We have all black — high percentage of black student body at Dunbar and high percentages right down the line to indicate where there were high percentages of black

students we did have high percentages of black teachers and vice versa. This is the case.

Q. Now, throughout this period 1951 to 1968, were there many teacher assignments, both white and black, in terms of teacher turnover, transfers, and new hires?

A. I could not verify that there were. There were always constantly new teachers coming in.

Q. So at the same time you had this pattern of assigning black teachers to schools that were becoming black, white teachers, new teachers or transfers, were being assigned to white schools?

A. Yes.

Here again, we don't want to go into the area of hearsay, but it was generally – it was felt by those of us who were teaching – I felt – let's put it on this basis, I felt –

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A. I felt that schools with predominantly black student bodies constantly receiving black teachers identified us as being black schools.

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Q. Mrs. Greer, what was the effects in terms of the assignments of the black teachers to the schools that were becoming black and white teachers to white schools?

A. As a parent, I had a daughter going to Roth High School when the staff was relatively an integrated staff and so was the student body. But as more and more black youngsters came to Roth High School, the staff became increasingly black, and my concern was to have my daughter involved in a school situation that would help her to live in a pluralistic society, and I felt I was being denied this privilege.

Q. Now, in retrospect, when you look at the situations that existed in 1933, '34, '35, '36, in the Garfield and Willard and in the Wogaman Schools as the type of thing that you are describing – from 1961 to 1968 did occur, is there any relationship between those two?

A The relationship as we were able to establish by the assignments of staff indicated that as the student body became black, staff also became black separating the schools.

Q. Now, after you came back from maternity leave in 1949, how long did you stay at the Willard School?

A. I stayed there from '49 to '58.

Q. And where were you assigned then?

A. I was then assigned as principal at Carlson School.

Q. And was that the year the school opened?

A. That is correct.

Q. And what was the racial composition of the school when it opened in terms of pupils?

A. I think – I remember correctly that the student body was 213 youngsters, and we had about ten to twelve white students.

Q. And what was the faculty composition?

A. Totally black.

Q. And in 1953, when the Miami Chapel School opened, what was its pupil composition?

A. Black.

Q. And faculty?

A. Black. There was one white teacher.

Q. And at the Belle Haven School which opened in 1954, what was the pupil composition and the racial composition of the staff and pupils?

A. The pupil composition was a hundred percent white and the staff was a hundred percent white.

Q. And in 1957, when the Louise Troy School opened?

A. It was black, with I think – with the exception I think about maybe 95 percent black and the entire student body was black.

Q. And in 1958, when the Shoup Mill School opened –

THE COURT: I am sorry, Mr. Diamond. Which one?

MR. DIAMOND: Shoup Mill.

THE COURT: Shoup Mill. Thank you.

A. Our records substantiate that the staff was a hundred percent white as was the student body.

MR. DIAMOND: Your Honor, may I note for your attention Plaintiffs' Exhibit – I believe it's PX-3 or 4 which shows new schools opening and additions to schools showing pupil composition and staff composition at the time of the opening of the school and with the addition to the school.

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[R. I. 497, Vol. 5] Q. Then if we move up to the Washington Elementary School District, there is a black neighborhood in that area on Springfield Street that has existed for many, many years in Dayton, is there not?

A. Yes, because I remember many of those youngsters came to Dunbar High School when I was a student there. They came all the way from that distance to Dunbar High School.

Q. Which they have the option of doing, as I understand it?

A. Well, yes, they had the option of doing that then but nobody else had a like option.

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[R. I. 502, Vol. 5] A. It was interesting, however, since you are just asking for that purpose, to note that the optional areas between Roosevelt and Colonel White did do an excellent job of siphoning off white students that were at Roosevelt.

Q. All right. And right now, the students who are living in that optional area north of all of these natural boundaries are largely black people, are they not?

A. Right now, yes.

Q. And the effect of that option is to permit them to go to Colonel White High School, is it not?

A. I don't know whether it is or not, but I do know, as I said before, at the time when I was closely involved with

Roosevelt, it did do the job of siphoning off whites. Of course, the neighborhoods have changed.

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[R. I. 515, Vol. 5] Q. And as the neighborhoods changed, the compositions of the schools serving those neighborhoods changed?

A. Yes. But I would certainly like to re-emphasize that assignment of staff to go along with the neighborhood change was the kind of thing that gave the impression of the schools designed to be black, because black staff increased as black student bodies increased.

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E. TESTIMONY OF MARY WHITE.

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[R. I. 389-395, Vol. 5] Q. Just state your name and occupation, please, ma'am.

A. Mary Louise White, Executive Secretary to the Superintendent.

Q. Miss White, how long have you been with the Dayton Public Schools?

A. I came to the Dayton Public Schools in September of 1961.

Q. Where were you employed at that time in the system?

A. I was employed as a secretary to the Assistant Superintendent for Personnel.

Q. And that's Mr. Royer?

A. Right.

Q. Were you acquainted, Mrs. White with the records kept in that office with respect to teachers?

A. Yes. It was a two-girl office and each of us were responsible for records, filing and keeping records.

Q. Can you describe for me at the time you came to the office in 1961 the method of keeping records relating to the substitute teachers?

A. Well, it was kept in a file folder. When they were employed, it was put into a file folder and there was a code a mark for the black substitute teacher.

Q. Have you at my request by subpoena brought some examples or an example of those files with you?

A. Yes, sir.

* * *

Thereupon, the document referred to was marked for identification as Exhibit 158.

Q. In the substitute records can you tell me what color cards were used for white teachers and what color cards were used for black teachers or was there only the indication of the dot?

A. Just the indication of the dot.

And may I show this, Judge Rubin?

THE COURT: Yes.

A. This was the card that was kept at the call desk. This is where the calls were made for substitutes. It likewise had the same designation.

Q. All right. Now, when you say at the call desk, can you tell me what the call desk was?

A. Well, of course, we are a large system and our calls come into a central call center for substitute service. At the time I started it was a switchboard. The switchboard operator handled these with the aid of an assistant part time.

Then we reached a point where we needed a fulltime substitute service office, and we now have that designated within the personnel department.

Q. So the cards of the jacket which you just demonstrated with the blue dot were maintained at the call desk?

A. It was maintained in the personnel office. The one that is inside, this happens to be a former teacher, a former substitute.

Q. I see.

A. This was kept at the call desk.

Q. That would be the jacket?

A. The information on what subjects this person could teach as well as certification and this type thing.

Q. Would you illustrate the other card to the Court?

A. The other system that was kept –

Q. No, I am sorry. Is there another card for the substitute other than the one you have just illustrated?

A. No, but for regular teachers. The other cards describe –

Q. For regular teachers?

A. Yes, our applications for regular teachers.

Q. Now, the blue dot does indicate a black teacher, is that correct?

A. Yes, that is right.

Q. How long were these records kept in that office, or how long were you familiar with them?

A. They were there as long as I was there.

Q. And that was through what date?

A. From September of 1961 through – well, it was the latter part of July of 1967.

Q. All right. Now, what about regular teachers?

A. The regular teachers applications came to the personnel department and, of course, we kept a cross-card file. This was a buff card. It was by subjects in alphabetical order, and the regular buff card was for the white teachers, and then we had blue cards with the subjects listed for the black teachers.

Q. Did you also have pictures of the teachers on the cards?

A. No, not on the cards. The only time a picture was kept was after employment, when a person was on the payroll.

Q. And you have a picture of the file?

A. After employment, yes.

Q. In other words, even if the dot had been removed or you had different colored cards, you could still identify the race of the teachers?

A. Yes.

Q. What was the practice during that time with respect to the assignment of the substitute teachers?

A. As far as I know, and of course the substitutes were called from the other switchboard, as I said, it was a practice that black teachers – black substitutes went to black schools and whites went to white schools, as was common with the assignment of regular teachers.

Q. Now, were black teachers sometimes sent as substitutes to white schools?

A. Yes.

Q. You say this was a general practice?

A. Yes, sir.

Q. With exceptions?

A. Yes, sir.

Q. Were you personally aware of these assignments, and, if so, could you tell me how?

A. Yes. I was personally aware of the assignments. We were a small office. We each knew the other's job, and in times of illness I pinch-hit for someone else who did the calling.

• • •

[R. I. 398, Vol. 5] Q. And insofar as regular teachers are concerned, the buff and blue cards situations you have referred to ended in '63, to the best of your recollection?

A. To the best of my knowledge it did.

Q. Now, were you the person that was in charge of these personnel records or was the other girl?

A. The personnel records were a matter that was shared. The substitute teachers' cards were primarily the responsibility of the clerk-typist in our office, but of course we were a two-girl office and we each knew the other's position and we did interchangeably work in each other's positions.

• • •

[R. I. 401, Vol. 5] A. That was the practice.

Q. And do I understand correctly that the reason for the blue dot on that card was that sometimes you would get specific requests for black substitute teachers?

A. That is correct.

Q. And those requests would come from school principals, I take it?

A. Yes.

• • •

Q. Just to clear one matter up, you said the purpose for the cards was if you got requests for black teachers. Did you also say the practice was assign black substitutes to black schools and whites to white schools?

A. To the best of my knowledge, it was in my early days there.

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F. TESTIMONY OF ROBERT L. GREEN.

[R. I. 433, Vol. 5] Q. Dr. Green, I believe I informed you that the faculties were desegregated as a result of HEW action in 1970.

Do you have an opinion as to whether or not the effects of this history of faculty assignment persist in terms of identification of schools as black or white in the school district after the changing of the faculties as was done in this case?

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A. Yes. The answer is yes, Mr. Lucas. When there has been historical practice of placing black teachers in schools specified as being essentially black schools and white teachers in schools that are identified or specified as being essentially white schools, even though faculty desegregation occurs, be it on a voluntary basis or under court order, the effect remains that school is yet perceived as being a black school or white school, especially if at this point in time the pupil composition of those schools are essentialy uni-racial or predominantly black or predominantly white.

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[R. I. 463, Vol. 5] Q. All right. I think I understand that point and the only point I am trying to make which I think I also understand from your testimony is that the actual faculty structure of the school doesn't really have the same kind of effect on the community perception of the school as the student population.

A. It doesn't have a full effect. It is important to desegregate a faculty, but it does not change the full perception of the community of that school.

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[R. I. 465-467, Vol. 5] Q. Now, you were asked a whole list of examples of schools. I think it started with Weaver in 1951-52 with 69 percent black students and a majority white faculty at that school, and you indicated the school would be identifiable as black because of its pupils. I believe the opening question related to a staff situation that I gave you that Weaver and several other schools in the period of 1951 to 1956-57 had the assignment for the first time of black teachers to the schools and that those schools, in fact, were the schools in the Dayton School System that already had the largest number of black children.

A. That's correct.

Q. And to make sure that the precise question is asked in the context of Dayton where the rest of the schools have white faculties and white student bodies, does the assignment of the black teachers to those schools as opposed to other schools with white children in a community accelerate or does it affect the perception of whether or not that school is intended to be a black school?

A. Not at all.

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[R. I. 468, Vol. 5] Q. To make sure we are together on the example, schools that have the largest proportion of black pupils and the other schools have no or have very few black pupils.

A. As a matter of fact, this could well and perhaps does facilitate that school in becoming perceived as being a black school or black area if I might use that term.

Q. But in another context assuming you knew nothing about faculty, these schools would be perceived as black instead of white?

A. Indeed it does have a label of a haven for blacks or one reserved for blacks.

Q. And if in association with that same school and assignment patterns, whites were permitted to transfer out into some optional areas, does that tend to label this changing school as a black school?

A. Yes, and it facilitates the pattern of segregation.

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G. TESTIMONY OF ROBERT REESE, SR.

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[R. I. 529-533, Vol. 6] Q. How did you get to school?

A. Walked.

Q. You walked across the bridge and the river separates that where you lived and the Central School; does it not?

A. Yes, sir.

Q. You walked across the bridge and got to that school; correct?

A. Yes, sir.

Q. Take your seat.

Did there come a time, Mr. Reese, when someone at the School Board found out that you were attending Central with a false address?

A. Yes, there did.

Q. What happened?

A. Well, they sent us home from school and told us we had to go to Garfield School, my sister and I.

Q. Did you go to Garfield School then?

A. No, I didn't go.

Q. Why didn't you go?

A. Well, my father didn't want us going out there in those frame buildings, so he filed a suit against the Board of Education and kept us out of school one year.

Q. You say out there in the frame buildings, can you tell me what was in the frame buildings?

A. Classrooms were black students and black teachers.

Q. And was there another building on the Garfield site?

A. A brick building with white teachers and white students.

Q. So, your father didn't want you to attend the black segregated classes; is that correct?

A. Yes.

Q. And he filed a lawsuit. Did you subsequently get into the brick building?

A. After they won the suit the following year because he died the 29th of June in 1925 and in September of 1926 I returned to Garfield in the brick building.

Q. All right. Did they still continue to operate the all-black classes and black faculty in the back of the brick building?

A. Yes, sir.

Q. And were they there after you finished your elementary school at Garfield?

A. When I left and went to Roosevelt, they were still there and still operating.

Q. While you were in the Garfield School, did they have any black classes during subsequent years in the brick building?

Q. After you left the Garfield School, where did you go?

A. Roosevelt.

Q. When you were at the Roosevelt School, did you participate in all school activities?

A. Football.

Q. Did you play freshman football?

A Yes, sir.

Q. Was there any separation of the races in connection with that?

A. Well, we had separate locker rooms, separate showers, and they had what they called the east and west swimming pools, and the white boys swam on one day and black ones swam another day.

Q. You did not swim in the same pool together at all; is that correct?

A. Yes.

Q. Did you leave Roosevelt after that?

A. When Dunbar opened, I left Roosevelt and hightailed it over to Dunbar.

Q. And why did you go to Dunbar?

A. I wanted to be free. I felt more at home at Dunbar than I did at Roosevelt.

Q. Why is that?

A. You couldn't segregate me at Dunbar.

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Q. At Roosevelt, Mr. Reese, the classes that you attended were integrated and had both black and white in them, did they not?

A. Right.

Q. And the football team on which you played had both black and white players on it, did it not?

A. Right.

Q. The practices you indicated as far as the separate locker rooms, showers and pools terminated by 1950, did they not?

A. I wasn't there in 1950.

Q. So, you don't know when they terminated?

A. I don't.

Q. Now, when you were attending Central Elementary School under a false address in the early '20's, you were in mixed black and white student classes there?

A. Yes.

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H. TESTIMONY OF JOHN HAREWOOD.

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[R. I. 565, Vol. 6] Q. Would you state your name, please, sir?

A. John Harewood.

Q. What is your present position with the Dayton Public Schools?

A. Assistant Superintendent in charge of administration.

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[R. I. 570, Vol. 6] Q. During the period from 1943 to '45, did you have a foster daughter in the Dayton Public Schools?

A. Yes.

Q. And where did she attend school?

A. At Wogaman Elementary School.

Q. And during that period of time was there any change in the pupil composition and racial composition of the black faculty and pupils?

A. Not '43. Did you say '43?

Q. '43 to '45.

A. No, not during that time, no.

Q. And was there shortly thereafter?

A. Yes. In 1945, when they appointed a black principal there, then there was a change.

Q. And what happened?

A. At the end of the spring — end of spring session they had an all white faculty and they appointed a black principal. In the fall they had a black principal and an entire black faculty there, black student body.

Q. Were there white children still living in the Wogaman attendance area?

A. There were.

Q. They did not attend the Wogaman School?

A. They did not.

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[R. I. 576, Vol. 6] He showed me a stack of applications that were all black. There were some with Master's Degrees, wives of people who worked at the Air Force Base and others, and we looked through those and we would comment what fine applicants they were, and the tragedy was that out of that many I needed one or two, and they were just there, yes.

Q. Separate pile of black applications?

A. Yes, that's right.

Q. Did your school ever have tuition pupils?

A. Yes.

Q. Could you explain for the Court what that means.

A. Pupils who live out of the Dayton School District who by paying a fee which is stipulated by the Board of Education could enroll in a particular school in any particular class if there was room in that school or class for them. And if they made arrangements through the Pupil Personnel Department for enrolling in the school, then they could become tuition pupils there.

Q. They had to be approved at the Central office?

A. Yes, that's right.

Q. And during what periods of time, and give me roughly what number of pupils and the race of those pupils who attended your school on a tuition basis?

A. Pupils, they were all black, tuition pupils who attended. I can't give you specific numbers . . . .

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[R. I. 582, Vol. 6] He asked me was I interested.

I said on those conditions, that's a position that my qualifications made me eligible for, then I would accept the position if it was offered to me, and under those conditions I was then appointed as Director of Secondary Instruction Curriculum for the Dayton Public School System.

Q. During the period of that appointment did one of the schools in the system have a fire?

A. Yes. Edison School had a fire during the time I was

serving as Director of Secondary Instruction Curriculum. Yes, sir.

Q. What did you do? How did you decide to take care of pupils in the spaces that had burned down?

A. The decision was not mine. I did not sit on the Executive Committee at that time. I was called in because of the problem we faced in reference to housing black children because of the fire.

At the meeting there was brought in from the Business Department a list of rooms in churches in the neighborhood of the Edison School, and they were trying to decide the best method for housing the children in the schools because the fire had been held.

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[R. I. 583-584 Vol. 6] Q. When those children were transported, where were they assigned within those schools?

A. I don't remember all the schools to which they were assigned, but one thing which was disturbing was the fact that in some school situations they were transported as a class with the teacher and came into the new school not as a part of the new school but still maintained their same identity as a class in the school to which they were assigned.

Q. In other words, there would be totally black-contained units in white schools?

A. That's right.

Q. Were you consulted on that decision?

A. No, that was not my decision.

Q. In view of your experience, your present experience, and your years of experience with both elementary and secondary education, was that decision to segregate those children educationally justifiable?

MR. GREER: Objection, your Honor.

THE COURT: Sustained.

MR. DIAMOND: Your Honor, I believe that Mr. Harewood has testified that he has been with the school system

some 35 years; that he now is the Chairman of Administration —

THE COURT: Mr. Diamond, you have had testimony as to what occurred. These classes were transported into literally a black enclave, and that is what I am concerned with.

Whether there were the best of reasons or the worst of reasons, or no reasons at all, we wind up with that fact, and that so far as I am concerned, is all the Court is considering at this time.

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[R. I. 590-592, Vol. 6] A. I refer specifically to the desegration of the staff which has occurred and the alternatives and my recommendations in regard to it.

BY MR. DIAMOND:

Q. Then, with respect to pupils as well?

A. Yes. I had a very strong feeling, and I indicated it to teachers and principals, to others who would listen that any desegregation of staff was not addressing the real problem of segregation of pupils which exist in the Dayton Public Schools.

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THE COURT: Whatever he recommended I am interested in hearing. What his thoughts were and his reasons I am not interested in hearing in this • • •

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Q. The Edison School, was it reconstructed after it burned?

A. Yes.

Q. And when the Edison School reopened, what was the racial composition?

A. All black.

Q. And what alternatives were considered to reopening the Edison School as an all black school?

A. The alternatives was to make it an early childhood center.

Q. And what would have been the racial composition of the Edison School as an early childhood center?

A. Black and white, but I don't know about the ratio because it would depend on how many children would attend.

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[R. I. 595-599, Vol. 6] Q. Mr. Harewood, let me make it clear that I want you to sort of list the alternatives and, if you will, I will ask you something further about them.

A. The alternatives that were considered and discussed in Executive Council and recommended by me in the discussion, were such things as pairing schools, magnet schools, looking again at the available classrooms in some schools, and since the responsibility for pupil assignment and teacher assignment was inherent in the superintendent's responsibilities, to look again and see if the assignment could be made that would bring about integration of some of the students in the schools. Also —

Q. Go ahead. I am sorry. I didn't mean to interrupt you.

A. Also in the general discussion we mentioned the fact that teacher desegregation should always be accompanied by pupil desegregation if we are going to address the problems which face us because of the segregation of pupils.

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Q. Mr. Harewood, since the HEW office had directed or had found that the system was in non-compliance with Title 6 of the Civil Rights Act of 1964, and the school system was about to commence a faculty plan of desegregation, what recommendation, if any, did you make with respect to timing of pupil desegregation?

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Yes. The recommendation which we made in reference to that act was that if it could not happen simultaneously with teacher desegregation, that as soon as possible after that pupils

should be desegregated in order to address the problem which faces us.

Q. You say "address the problem which faces us." What problem are you speaking of at this point? I want to make sure I understand.

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A. The problem that the Dayton Public School faces because of the segregation of the pupils in the school.

Q. All right. You recommended that they proceed – the pupil and faculty desegregation proceed simultaneously, if possible, or if not, shortly thereafter?

A. Yes.

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Q. You understand, Mr. Harewood, I am not asking you to tell me what is right or wrong about segregation, but I am asking you to deal with mechanics if you will. That is probably an unfortunate word. Will you try and answer the question in that context?

A Mechanics?

Q. What was the object of the faculty decision? What was the goal to be accomplished in a narrow sense, if you will?

A. So that we would no longer have schools which are identifiable by race because of the composition of the student population or the faculty population or the administrative assignments.

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[R. I. 608-609, Vol. 6] Q. Now, to go back to just a few points in your testimony, I understand that you were at Dunbar from 1938 to 1954; is that correct?

A. Yes.

Q. It was during the period from 1943 to 1948 that Dunbar became integrated into the City Athletic System; is that not correct?

A. 1948 and '49, they became, those two years.

Q. Didn't they start with training in '43, or do you remember?

A. Probably, yes, sir. I was speaking of the major sports. There may have been some activity in sports, yes, sir.

Q. But the two major sports are, of course, basketball and football in Dayton; aren't they?

A. That's right.

Q. In 1948 Dunbar became completely integrated into the City Basketball Leagues?

A. Yes, that's right.

Q. Then the following fall it became completely integrated in the City Football Leagues?

A. That's correct.

Q. And that has been the situation ever since; has it not?

A. That's right.

Q. You indicated that as a counselor at Dunbar from 1949 through 1954 you visited the area schools that would potentially feed children to the Dunbar High School?

A. Correct.

Q. In those days, and up to 1962 I think it was, Dunbar was an optional school; was it not?

A. Yes, sir.

Q. In other words, a child anywhere in the City System could elect to go either to the high school in his neighborhood or could elect to go to Dunbar?

A. Yes.

Q. The only other school with a city-wide attendance district at that time was Patterson High School; wasn't it?

A. Yes.

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[R. I. 611, Vol. 6] Q. The children who had been in class during that school year up until the time the school year burned down were transferred with the schools intact to these various predominantly white schools?

A. Yes.

Q. Then it was the start of the school year the following fall when those students became integrated into the other classes existing at those white schools; isn't that right?

A. In some instances some of them did it right away. Some waited. Some didn't do it until the next fall.

Q. How much time was left to complete the school year class that those children had with their teachers at Edison when the Edison School burned down?

A. I am not sure of the exact date, Mr. Greer, and the year when that happened.

Q. It was sometime in the spring?

A. In the spring, yes.

Q. Wasn't it a month or two before school was due to let out?

A. That's right.

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[R. I. 778-780, Vol. 7]

(Thereupon, the following proffer was made into the record by Mr. Diamond out of the presence of the Court:)

Mr. John Harewood, if permitted to answer whether it was educationally justifiable to segregate the children from the Edison School for the last six weeks of school to white schools would have testified as follows: From his experience as an elementary principal, second curriculum coordinator and second local chief administrative officer of the school system, would have testified that there was no educationally justifiable reason for segregating these children in the classes intact with their black teachers in otherwise virtually all-white schools.

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If permitted to testify with respect to the reasons for his recommendations with respect to faculty and pupil desegregation, Mr. Harewood would have testified as follows: First, the

faculty and pupils should be desegregated simultaneously or in as close coincidence as possible.

Second, that from his experience with the patterns of segregation and discrimination directly resulting from and being opposed by the Dayton Public School System and its accommodation of the white community's hostility to association with blacks on an equal basis, that when pupil desegregation was not made part of faculty desegration it was a symbol of the fact that the white community was still hostile to and unwilling to accept pupil desegregation.

If permitted to testify to the reasons for the January 3rd, 1972 action of the Board in reimposing segregation and redrawing every boundary in the school system which had the effect of establishing the substantial duality in pupil populations on a racial basis that is now present, Mr. Harewood would have testified that such action was merely the most overt act of discrimination and segregation by School Board action; and further would have testified that such overt act was necessitated because of the Board's decision on December 8, 1971 for the first time to come to grips with its own responsibilities to eradicate the patterns of discrimination and segregation which it had caused in substantial part for the past 50 years.

Mr. Harewood further would have testified that faculty desegregation given the history of identification of schools as black or white, and intentional tailoring of schools to serve white pupils or black pupils by the racial pattern in faculty assignment would not disestablish the racially dual system of education imposed by public school authorities.

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I. TESTIMONY OF ELLA LOWREY.

[R. I. 620-631, Vol. 6] Q. And where did you teach?
A. Garfield Elementary and Wogaman Elementary.
Q. All right. While you were a student in the system,

did you become familiar with the Garfield Elementary School?
A. No, I did not.
Q. When did you first become aware of the Garfield Elementary School?
A. When I met Miss Louise Troy who was teaching there.
Q. And do you know under what circumstances she was teaching physically? Was it in the main building or elsewhere?
A. I knew she was teaching a class of first and second grade black children in the brick building right at the rear door in a classroom there.

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Q. Can you give me the approximate date?
A. Well, I would say this was just before the flood years.

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About 1912 or 13.

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Q. And she was teaching in an all black class and Mrs. Troy is black?
A. Yes.
Q. In the brick building at that time?
A. Yes.
Q. Do you know what happened to that class thereafter?
A. I lost track of what she was doing because I finished high school and started going to Dayton Teachers Normal and I lost track of her until I finished Dayton Teachers Normal and went to teach myself.
Q. That was in 1918?
A. Yes.
Q. And when you went to teach Garfield, where were the black students being taught?
A. In a two-story frame building with four rooms that was a converted four-room house, two rooms down, two up with a stairway in the center.
Q. Were there any black students in the brick Building?
A. Not at that time.

Q. And were the teachers as well as the students black in the frame building?

A. All of us were black.

Q. Can you tell me what happened in the way of growth of for want of a better term I will call it the black annex to the Garfield School? Did you have an increase in enrollment during this period of time you were teaching?

A. When I went to do my practice teaching there where all the black Normal School girls went, there were four classrooms, a first and second grade in one room, third and fourth in one room, fifth and sixth in one room, seventh and eighth in one room. The classes were very large running about 50 children.

Q. Is that 50 children to one teacher?

A. To one classroom and one teacher. The next year, in 1918, that summer, they put up a two-room portable frame building with big stoves in it to heat them and I was hired along with another young woman to take a single second and third grade. I had third. The other girl had second, and this relieved the double classes in one room.

Q. Now, you taught —

A. At that point in time, that made six black teachers with six black classrooms.

Q. You were teaching in the portable portion of the building; it that correct?

A. Yes. The brick building sat here (indicating), here was the big yard (indicating), here sat this house (indicating), and on the other side of that was the frame, the two-room frame building.

Q. Were your classes large at that time?

A. At that time, when I began, I think I must have had about 25 or 30 children.

Q. Did there come another expansion in enrollment of children in the annex?

A. Yes, and it happened very fast. I would say it was due to the fact that after the flood, blacks moved out of the inner city proper, as we term it now, going west to go up

high out of the flood territory where we had had the flood, and they were moving fast into the west side, further west.

Q. Was there another addition built to this annex?

A. We stayed in this small frame, I can't tell you how many years, but being very fragile, the building being very fragile, it was soon delapidated, in bad condition. The walls were bad; the windows were bad and broken out, and the heating unit became bad.

Then they build what I would call a permanent building directly behind this frame house. I say permanent because the floors were concrete, there were toilets in the basement; furnaces in the basement, an iron stairway to come up from the outside into the building. That was for four rooms.

Then the two-room portable was torn down. At that point in time then we had eight black classrooms with eight black teachers.

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Q. You say '21 and '22, you mean the years?

A. Yes, and at that same time the white teacher in the brick building with all white children had 20 children and I had 42. There was no effort made to equalize our classes. I kept 42 and she kept 20.

Q. Were you there in 1927 at the time the Reese case was filed?

A. Yes, I was.

Q. You were teaching still in the annex or the wooden building; is that correct?

A. Yes, I was, and Mr. Reese didn't like this thing, and he said he would not send his children there. They would not permit his children to go into the brick building, and he said he would not send them across the river to Central School. He would sue the School Board first, and he kept his children at home.

Now the School Board at that time, not knowing what was going to happen, hired we eight people on a day-to-day substitute basis in September.

Q. You say eight people?

A. Eight teachers. There were eight black teachers of black classes.

Q. Where did they hire you as substitutes? You had been hired previously?

A. Yes.

Q. Where were you hired as substitutes on a day-to-day basis?

A. They told us that they didn't know whether we would be there after the case was settled or not. If the case was settled and they had to admit black children to the white classes in the brick building, then there would be no reason for us to be there, we were told.

Q. You would not be permitted then to teach the white children?

A. No. This is what we were told.

Q. The case was finally disposed of. Were you then given contracts?

A. We were given contracts and given the retroactive pay that we lost from September until December.

Q. Did you know what happened to Mr. Reese's son?

A. He came on to school and went to the classes in the brick building.

Q. How did the black children get into the brick building after that?

A. They had to go to the administration building, the parents had to go and make a special request that their child be admitted to this brick building, and a little later in time, shortly after that went on for a while, people objected so to it, then they were permitted to bring their child to Garfield School and asked permission to have their child entered in the brick building, but the parents had to come into it.

Q. And ask the principal?

A. They had to ask the principal, "Place my child. I want my child placed in the brick building."

They had to come and so specify.

Q. If they did not do that, and they lived in the Garfield

zone, they would have been assigned to the black annex; is that correct?

A. They were assigned to the black teachers in the black annex and the black classes.

Q. Did the black population continue to grow and did in turn the number of white pupils available in that area decrease?

A. There came a time in the late '20's when we just had more children than we could handle and the weight seemed to be in the fifth and sixth grade area. At that time one black teacher was hired and she was given a room right at the rear door of the brick building. She was the first black teacher to work in the brick building at this time.

Q. Other than Mrs. Troy?

A. Mrs. Troy, in the meantime, was over in the frame building with us. Now that was in, I would say, about '27 or '28, this was, and then at the time of the depression in '32 –

Q. Excuse me. Let me interrupt you. This black teacher by the back door, was she teaching an all-black class?

A. An all-black class of fifth and sixth grade children.

Q. All right.

A. Then that was the only teacher for the black children in that buildinng up until the time during the depresson when married women teachers whose husbands could support them had to go home, and I was one of those that went home in '31 and '32. When I went back in '32 and '33 there was no place for me. We had had somewhat of a disturbance about these people being let out, and we were all assigned back to work. There was no place for me, because by that time another teacher had my class.

Q. Another black teacher?

A. Another black teacher had my class, and they had been told – the Board had been told – assign all those teachers.

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The Board of Education then said that I would – well, now, how do I say that – we had a court case out of it, and the mandate was, "Retire these teachers."

Wouldn't that be to the Board?

Q. Go right ahead.

A. Where was I before I was so rudely interrupted?

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So then we went back to work. That's always been a sore spot with me, my being let out that one year, interrupting my service, you know – so when I went back to work there had to be a place made for me, so to speak, so then 18 children who were slow, troublesome, worrisome, bothersome, generally disliked, were called from their groups and given to me in an ungraded class. There was no place to put me excepting in the brick building in a room that had formerly been the principal's office, a little cubbyhole upstairs, and this mixed black fifth and sixth grade and my black class upstairs were the only two black classes in the building.

Q. Let me just make it clear. When you say mixed, you mean mixed grades, not mixed pupils?

A. Yes, I do. No. No. No. No. No. These were all black children, and I had about 18 of these in this little room upstairs in the building. All the rest of the building was white excepting we two black teachers and these two classes of black children.

This continued until about, as I remember now I was in that room about two years, which would make it about '34 or '35. We had two little white children left in the building. Now these ten white teachers were maintained through all of this, and then as our classes became overflowing with black children, they were placed in the white teachers' rooms, but not until there was no place for the child to sit in the room.

Then when there were only two little white children left in the building, the white teachers were all reassigned. The black teachers were put in these rooms. We had at that point in time eight and ten – eight and two, that was ten – and six white teachers remaining in the building at this time now

teaching whites, a few whites, three and four in a classroom, and all the rest of their children were black.

Then, as soon as there were only two whites left, there were black teachers assigned to these rooms, and a black principal was assigned, and that was about '35, as I recall.

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[R. I. 635, Vol. 6] A. Then I resigned. Then I was out of the system six years, and then I went back and continued on until 1953. When I went back I went to Wogaman School and I stayed there twelve more years doing 40 years service in all in Dayton, and I never taught a black child in all – pardon me. I never taught a white child in all that time. I was always in black schools, black children, with black teachers.

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J. TESTIMONY OF MARTIN E. SLOAN.

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[R. I. 667-670, Vol. 7] A. Yes, sir. This is the 1971 annual report of the President as required by the 1968 Housing and Urban Development Act. At page 26 the President states, "Residential separation of minorities was and is another characteristic of the social environment which has been influenced by Federal Housing Policy. Until 1949 FHA officially sanctioned and perpetuated community patterns of residential separation based on race by refusing to insure mortgages in neighborhoods not racially homogeneous. The effects of this policy have persisted for many years after its reversal and are still evident in metropolitan areas today."

Q. Mr. Sloan, directing your attention to – coming back to the FHA multi-family program, the public housing program, does it require any certification before a project may be built or expanded from the local school agency?

A. Yes. It is among the requirements by the Federal Public Housing Authority –

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A. Among the conditions which are required by the Federal Public Housing Authority is an assurance that there are or will be school facilities adequate to accommodate the children who will be living in the public housing project, and this is a condition before approval is given. And one way that this assurance is given is through a letter or certification from the local educational agency.

Q. If such a certification is not made in some form or fashion can the project be built?

A. No, it cannot. Federal approval will be withheld.

Q. Mr. Sloan, let me give you a hypothetical – what may be a hypothetical situation. Assume a proposal is made to build a Federal Housing Project in a period of time when the agency did require segregation in the housing – that it true, it did require that, the Federal Public Housing Authority?

A. Yes. Many localities did require it.

Q. All right. Assume the proposal is to locate a public housing project with that given, that it will be segregated in an area that is on that map red, and therefore predominantly black, if the school authority refuses to provide school space in that area on any ground, it cannot be built, is that correct?

A. That is correct.

MR. GREER: I will object, your Honor. This isn't laid with any premise in the Dayton School System.

THE COURT: Objection overruled, Mr. Greer.

Q. Now, assume the School Board advised the housing agency that we will not build or add onto school space in this area because your policy is one of segregation and that will result in, because of the racial composition of the area, an all-black school; however, if you build it in an area where there are white children, white residents, then we will provide school space regardless of what your tenant selection policy may or may not be, could the project then be built only in the area where the school space could be provided?

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A. That would be right. So far as the Federal Public Housing Authority is concerned, so long as there are going to be adequate school facilities which will accommodate the children, that is the locationn they will approve.

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[R. I. 672, Vol. 7] Q. Now, I take it, Mr. Sloan, that from your limited understanding, the school authority cannot tell the housing authority what their tenant assignment policies should or should not be, is that correct?

A. As far as the Federal –

MR. GREER: I will keep my continuing objection to all this questioning.

THE COURT: I assumed that, Mr. Greer.

A. As far as the Federal Public Housing Authority's position is concerned, until 1962 the kind of tenant assignment policy adopted by local public housing authority was entirely up to the local public housing authority. Whether it wanted to adopt a segregated tenant assignment policy or an integrated tenant assignment policy was entirely a matter for local decision.

Q. As far as you know, the school authorities could not dictate the tenant selection?

A. As far as I know, the school authorities could not.

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[R. I. 674-763, Vol. 7] Q. Mr. Sloan, just to make it perfectly clear, may a Federally assisted, through the local housing agency, project be built if the school authorities decline to provide the school space?

A. No, they may not. Unless the Federal Public Housing Authority can receive assurance that there will be school facilities to accommodate the children who are living in the project, they cannot approve construction of that project. And if the school – local education agency does not give that assurance for whatever reason, then the project cannot be built.

Q. All right. Mr. Sloan, turning from public housing to

Federally assisted multi-family housing, do you know whether or not similar assurances are required under those programs?

A. Yes. Similar assurances are required with respect to FHA assisted multi-family housing, subsidized housing for low to moderate income families.

I believe, but I am not absolutely sure, that similar assurances also are required for non-subsidized FHA assisted multi-family housing.

Q. To your knowledge, is any formal certification required for single-family assisted housing?

A. I am not sure, Mr. Lucas.

Q. But the underwriting criteria indicate evaluation of that, is that correct?

A. Yes. The adequacy of schools always has been and still is an important consideration that goes into the decision to approve or not to approve FHA assisted housing.

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K. TESTIMONY OF HERBERT CARROLL.

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[R. I. 700, Vol. 7] A. Yes, it does.

Q. In terms of your curriculum?

A. It does.

Q. Do you know, or from your observation of the applications, is there a pattern of particular schools that white children are applying for curricular transfers from, and is there any pattern to the schools they seek to attend?

A. Yes. Basically in most Roth High School – let me be more specific. Particularly the white youngsters in Roth High School are seeking Meadowdale and Stivers Schools for latin and power mechanics. That seems to be the reason why they want to leave.

THE COURT: Excuse me. Which high school are they seeking to leave?

THE WITNESS: They are seeking to leave Roth High School, Your Honor.

Q. Roth, Meadowvale and Stivers; is that correct?

A. Yes.

Q. What about from Roosevelt; are there any transfers from Roosevelt?

A. Yes. Basically the transfers – you are talking about black students now?

Q. I am talking about white students.

A. There aren't any white students at Roosevelt.

[R. I. 713, Vol. 7] A. 716 high school youngsters.

Q. And in addition to those 716 students, there were 625 elementary students?

A. That's true.

Q. And if we look to the non-minority races over the periods that we are talking about, there were 23 students that transferred under the freedom of enrollment program in the elementary and middle schools; is that right?

A. That's true.

Q. And 89 in the high schools?

A. That's true.

Q. Now, some of these transfers would be from predominantly black schools to predominantly white schools, would they not?

A. That's true.

Q. And there are a few that are from predominantly white schools to predominantly black schools?

A. Correct, yes.

Q. The transfer depends on the choice of the student and the available space?

A. That's true.

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L. TESTIMONY OF DORIS BROWN.

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Q. Will you state your full name and your occupation, please?

A. I am Doris Brown, Principal at Miami Chapel School.

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M. TESTIMONY OF GRACE TOLES.

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Q. Would you state your name please?
A. Grace Toles.
Q. Where do you reside?
A. Dayton, Ohio.

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N. TESTIMONY OF LELIA I. FRANCIS.

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[R. I. 791-792, Vol. 7] Q. Are you familiar with the Garfield School area?

A. I am familiar with the Garfield School and the Willard School. Willard School is where by daughter went to school when I first came to Dayton, and it was a predominantly black school.

Q. Now, when you lived in the Garfield area –

A. I lived – not Garfield, Willard.

Q. Willard?

A. Yes.

Q. Did you know of any bussing of children out of there?

A. Definitely. I had occasion to talk to a woman who lived in an apartment above a store at the corner of Germantown and Summit. Willard was on the corner of Germantown and Summit. She wanted her child to go over there to school.

Q. Was she black or white?

A. She was a white woman. And they refused to let her child go just across the street, and a bus picked her up and carried it out from Summit and Germantown.

Q. You say Willard or Wogaman?

A. That is Willard.

Q. O. K.

A. Willard.

Q. Did you know of any other students, white students, who were bussed out of particular school areas?

A. The children from – when Wogaman changed, why those children were bussed out of the Wogaman district.

Q. When you say "those children" you mean the white children?

A. The white children were bussed out of the Wogaman School District.

Q. What was the effect of the urban renewal policy in terms of residents of blacks in East Dayton in the early years?

A. Well, the urban renewal program became known as the black removal program. They removed all of the black people from near the center city of Dayton, Ohio. You will not find one black person in that section now.

And the same thing happened in the east end. They moved all of the little pockets of black people who were out there. Why, they encouraged them and made it possible for them to buy property in the West Dayton area.

Q. This was true also of the public housing where they were building white projects in East Dayton, is that right?

A. Right.

Q. Did the relocation agencies actually relocate black people in West Dayton?

A. Absolutely. Absolutely.

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O. TESTIMONY OF DAVID GEORGE CARTER.

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[R. I. 797, Vol. 8] Q. During this period of time of transsition, do you have any idea where the white students attended school?

A. Yes. I guess, if we are talking about '57-58, after my freshman year, it is rather difficult to say, for some individuals that I went to elementary school with at Addison never arrived at Roosevelt, which leads me to believe one of two

things – and they still stayed in Dayton; they resided the same places, in Summit Courts, which is now called Lower Dayton View, if you are familiar with Dayton, right off of Negley.

Black students that lived in that area made it to Roosevelt. Okay. When you asked me what happened to the whites, they disappeared.

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[R. I. 811-813, Vol. 8] Q. Mr. Carter, are there any, and if so approximately how many, white children who take advantage of the freedom of enrollment to transfer to predominantly black schools?

A. I know of none.

Q. That does not mean there might not be a few?

A. What's a few when you are talking about 500 black kids going across town, and we are talking about one white or two whites.

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Q. Now, with respect to the curriculum transfers, are there instances where white children take advantage of that through transfers from a black school to a white school?

A. I gave you the example, the individual who left Jefferson and went to Meadowdale.

Q. Are there other such examples?

A. I can't cite specific examples. However, the way the policy is written up it is possible that – the policy as written states that curriculum changes do in fact have priority over racial changes.

Q. Now, are you aware of the capacity limitation on the freedom of enrollment policy?

A. I am, but I am also aware that there is a discrepancy in that. We have had three changes in freedom of enrollment. One we dealt with, first of all, what the principal said. If he said his building was full, it was full.

Secondly, we tried to deal with projected enrollment. The third area is actual enrollment within a building, the number

of youngsters that could actually attend a building without filling all of the classes.

Q. Now, are those actual enrollments that are projected the same as the rated building capacities?

A. Not necessarily. Not necessarily. As an example, you may have a projected enrollment for 700 in a building, you may have only 600 attend. The actual capacity may in fact be 1,000.

Q. In other words, in terms of the individual capacity to accommodate the children?

A. That's correct.

Q. And what would be required then would be the reassignment of some teachers in order to maintain some sort of class size?

A. Yes. This year what we have had to do is that we, because of freedom of enrollment, population shift, we have transferred teachers from one building to another, and, yet, we still have space, you know, and also we have turned back applicants.

Q. Black applicants?

A. Yes. I am aware of some because I work with them.

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[R. I. 850, Vol. 8] Q. Now, if we had a square here hypothetically and this were the Jefferson School zone, what you are describing in terms of overcrowding might be called spot or non-contiguous zoning. In other words, we take a quarter here and assign them to a school someplace else in the school district.

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Q. Mr. Carter, are you familiar with other school systems where often they use this type of zoning, spot or non-contiguous zoning for overcrowding and other purposes?

A. Some for racial discrimination.

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P. TESTIMONY OF KARL TAEUBER.

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[R. I. 924, Vol. 9] Q. All right. And then assume that the School System has – I am pointing generally to the map, but not necessarily to particular schools.

Assume along the area of change, 1970, Cornell Heights, Jefferson, in that range there, assume along that area of change that the School System for the first time assigns black teachers to the schools in the area of change which already have between 35 and 69 percent black students.

At the same time, there are a large number of schools with no black teachers in them, and almost only white children in them.

What effect, if any, in light of the past assignment practice, does the assignment of black teachers to those schools and not the others have in terms of identifying these areas?

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A. I think that this would be treated as information by anyone interested in what might happen to these schools that they are being defined as becoming black schools in the pattern where most schools are either entirely black or entirely white, so that it is a move in this hypothetical case toward defining the school as one which is becoming in the context of the racial views of the population more suited for black students than for white students.

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Q. TESTIMONY OF WAYNE M. CARLE.

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[R. I. 956-958, Vol. 9] Q. Your present employment is Superintendent of Schools in Dayton; is that correct?

A. Yes.

Q. Dr. Carle, what were your duties when you were Assistant State Superintendent?

A. I was in charge of the area of instruction which included five divisions, one of them for the chartering of schools, about 5,000 elementary and secondary schools involving annual inspections; the area of teacher certification involving the accreditation of 51 teacher preparation institutions and about 90,000 teacher certificates; the area of instructional materials; the division of special Education, that is, education for the handicapped; and the area of guidance and testing for the State of Ohio.

Q. You mentioned chartering schools. Will you tell me what you mean by that?

A. Yes. Until about the time I joined the Department, it had to do with issuing charters for new schools and then inspecting them for meeting state standards. At about that time, about 1966, as I remember, the legislature changed the term to chartering of school districts meaning presumably that all the schools within a district must meet standards and the report forms were developed for that purpose.

Q. All right. Was this one of your particular assignments?

A. Yes, that was one of the divisions over which I was responsible and in which I would engage if there were appeals or problems arising from them.

Q. Am I correct in analogizing chartering to accreditation?

A. Yes, the term accreditation often is applied to a voluntary association such as the North Central Association of colleges and secondary schools and chartering is a specific term used in Ohio to specify accreditation or certification by the State Department of Education. They are separate processes but they are related.

Q. All right. Did you have any particular responsibility with respect to chartering multi-county schools? Did that fall into that jurisdiction?

MR. HOLSCHUH: If your Honor please, I have not objected, but I assume that none of this testimony is being offered in connection with any issue involving the State Defendants.

THE COURT: I would assume this is by way of background, is it not, Mr. Lucas?

MR. LUCAS: Yes, and it will lead to the State Defendants in relationship to the Dayton School System.

MR. HOLSCHUH: Then, I do object, your Honor.

THE COURT: I am going to sustain Mr. Holschuh's objection. We are not going to determine at this time the relationship of the State Defendants to the Dayton School System.

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[R. I. 974, Vol. 9] A. I think you asked me something to the effect of whether racial segregation bore on the chartering of the school, something to that effect.

MR. LUCAS: Yes.

MR. HOLSCHUH: Your Honor, I believe my objection is in the record.

THE COURT: Overruled.

A. I recall the situation in 1966, approximately, when the Middletown Board of Education was completing a new high school, and it was time to request a charter for that school. There was some controversy in the community that the fact that the new school was located in, I believe, a white area of the City, and the old building was in a black area, or at least a mixed area of the community, and that if indeed a new high school were opened and the other left operating as a second high school, that one would be racially segregated quietly.

It was represented to my department that if an exception in standards could be made so that the schools could be chartered as to campuses of one building, that the objection to segregation could be overcome, and it is my recollection that we thereby gave a waiver and that the school then operated when it opened, approximately in '67, perhaps '68, as a ninth year, a vocational program on one campus, and ten through twelve on the other campus, so that all students went to both buildings.

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[R. I. 1004, Vol. 10] Q. How does this relate, Doctor, if at all, to previous practices of the Board of Education?

A. Well, as I reviewed the personnel files and the past observations in the district, there was virtually no transfer, that is, there was very little transfer of teachers, and up until the early 1950's, a policy of no assignment of black teachers to classes with white pupils.

Along about that time, I think I had referred to some statement I had seen of either administration or a Board indicating that that practice was to cease and that there would be gradual assignment of black teachers in communities or in school areas where the communities would accept them. That practice discontinued – well, it was in force when I came to the district, in that there still were schools in which there were no black teachers whatsoever, and the personnel department, as I discussed the necessity of moving in that direction, would insist that some communities had never had a black teacher or were not ready for a teacher or a teacher is not ready to go there.

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[R. I. 1102, Vol. 11] Q. Well, in 1933 I believe the minutes have an entry with respect to the opening of Dunbar, is that correct?

A. I think I have that.

This is June 5, 1933, and the entry says "Be it further resolved that the 7th and 8th grades at Garfield and Willard Schools be discontinued and that the attendance at the Dunbar School be optional for all junior high students for all 7th, 8th, 9th grade levels in the city."

That would be at the time the school was organized.

Q. And Dunbar is where the McFarlane School is presently located on the map, is that correct?

A. Yes, roughly in the same area as Roosevelt High School.

Q. Is there another minute entry in the forties, dealing with the Dunbar School?

A. In 1942, the entry is "Be it further resolved that the 7th grade pupils from the Willard and Garfield Schools be assigned to Dunbar High School."

MR. LUCAS: Thank you.

THE COURT: Dr. Carle, let me ask you a few questions: I was under the impression that Dunbar, from its inception, was an all black high school?

THE WITNESS: Yes, that is my understanding, Your Honor.

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[R. I. 1110-1114, Vol. 11] Q. Then, without regard to to what the position of your Board is, is your own philosophy as you will, opposed to the concept of the neighborhood schools or the forced bussing of students?

A. Neighborhood school is a term that I think defies definition. I have not heard it defined in this court and, therefore, I find it difficult to take a position one way or another on the term neighborhood school. I don't have a feeling about the term unless you define what you mean by that. The term forced bussing to me also has little meaning under the law. The Board of Education is required to provide transportation to students if they are in the elementary grades more than two miles away from school, and my experience has been that parents not only are eager to have that transportation but in some instances is very piqued in our district because we have proposed doing away with transportation that existed for distances less than that, and I therefore hardly look upon the transportation of pupils as being a "forced matter." I think usually it is quite the opposite. Persons want transportation for reasons of convenience and safety.

Q. Well, if I understand you correctly then you would regard these two concepts, the neighborhood school and the forced bussing of students as relatively meaningless concepts, that you can't really take a position for or against?

A. Well, I would find it very difficult to take a philosophical position, because I think both of them have been bandied around and have very little meaning or understanding in terms of any educational or administrative function of the school. I think they are just terms that are used but certainly don't relate to reality.

Q. All right. Now, you are, and back in December of 1971, were aware of the existence of Section 331348 of the Ohio Revised Code, which provides that the Board of Education of each city shall provide for the free education of the youth of school age within the district under its jurisdiction at such places as will be most convenient for the attendance of the largest number thereof, isn't that correct?

A. The question is was I aware of that statute, and the answer is yes.

Q. All right. Now, you have also told us on direct examination that you are aware of instances of specialized city-wide schools in the State of Ohio?

A. Yes.

Q. Are you aware of the Walnut Hills Academic High School in Cincinnati?

A. Yes.

Q. You were aware of an application from some people in the Toledo area for a city-wide school that was denied by the State?

A. Yes.

Q. Isn't that right?

A. Yes.

Q. You are of course, aware of the Patterson School, which is a city-wide school in Dayton, are you not?

A. Yes.

Q. That is a vocational high school where the students work two weeks and go to school for two weeks, is that not right?

A. Yes.

Q. You also indicated on your direct examination the instance of Dunbar, but that has been a school with neighborhood boundaries since 1962, has it not?

A. Again, it has boundaries. I don't know what the term neighborhood would refer to.

Q. Well, you referred to a two-mile radius a few moments ago. The accessibility of an area to the school is what determines its attendance zone, is it not?

A. No. I did not refer to a two-mile radius. I indicated that if a child resides more than two miles from a school, the law requires that he be transported to school. It has nothing to do with the radius or any limitation or guideline as far as distance is concerned.

Q. You would regard that two-mile radius for transportation as irrelevant to the questions of locations of places convenient to the attendance of the largest number of students?

A. I knew of no case in which in any standard of that kind has been applied in Ohio.

Q. All right. Without using the term "neighborhood" which you apparently don't recognize, Dunbar since 1962 has had a geographic attendance zone, has it not?

A. It is my understanding that that is so, yes.

Q. And the geographic attendance zone for Dunbar is in the geographical area where the physical building exists, is it not?

A. In the sense that the building is located within the boundaries described, for the attendance area, that is true. The boundaries, of course, are very irregular and very considerable in their distance from the building.

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[R. I. 1116, Vol. 11] Q. Just to clear up that one point: Is it your testimony that you don't understand what is meant by the concept "neighborhood school", Dr. Carle?

A. I would understand it in a context, and I simply am searching for the context in which you are describing it. • • •

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[R. I. 1123, Vol. 11] A. I wouldn't have thought there was any connection between freedom of enrollment on one hand and the term forced bussing on the other hand since there was no transportation as far as the Board of Education was concerned involved in freedom of enrollment. There was transportation available to students in the district. For example, sizable areas in the northwest and southeast areas and

students were given transportation. They were forced to attend those schools in the sense that those were the attendance regulations of the district, but that's why I say that term to me is so meaningless because wherever a student is assigned, if he is two miles or more from that destination in the case of the Dayton Schools a mile and a half, transportation is provided and generally welcomed.

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[R. I. 1191, Vol. 11] A. No. I think any of the citations that are honestly made reflect the typical white response to the black concerns of the time. Obviously, it is a very defensive paper and tends to cite rather limited measures none of which address the fundamental segregation of the schools district.

Q. And you also cited the fact that nine receiving schools would be more racially balanced with children from Edison and Jefferson where their elementary grown had necessitated transportation.

A. I thought that was a very positive development. Thus, I regretted the fact that we segregated back into the original schools two years later.

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[R. I. 1221-1222, Vol 12] Q. Well, without looking at the little map that's up in the right-hand corner, we have established that Mad River Township is an area to the east and northeast of the city limits of Dayton, haven't we?

A. Yes.

Q. And the high schools most accessible to that east side of the city are Kiser, Wilbur Wright and Stivers, are they not?

A. I don't see that that has any bearing, since they were already on board, and the distances probably were no greater than those being used to send black students to Dunbar at the time anyway.

Q. Well, let me rephrase my question. The three high schools to which these students were sent were geographically

located closer to Mad River Township than any other high schools in the System, weren't they?

A. I would say that that geographically is so. I think it needs to be understood that we are talking here about inner district transfer. These students were not residents of the city school district of Dayton, and were admitted to the district by Board action and contract, and therefore there is no relation to any existing boundaries within the Dayton School District.

THE COURT: Dr. Carle, would you have not taken them to the closest schools?

THE WITNESS: Well, I think the issue at the time, your Honor, was that there was not space for high school students at Mad River. When it became apparent, that is, the study that is in evidence, as I interpret it, became apparent that there would not be room at Wilbur Wright and Kiser and Stivers to continue serving those students. I'm simply saying that to my knowledge there was no consideration of housing them at Roosevelt or Roth — Roth was not in existence then. Well, perhaps it was, the later years — and Dunbar, and if space were available there, it would be just as appropriate to house the students in those schools as in the ones that were alleged to be without space.

THE COURT: And it would be your position that the Board's failure to do that is evidence of segregation?

THE WITNESS: Well, it certainly fits the pattern that has been pervasive down through the years, that no white students, regardless of from where they came, or the purpose, were assigned to black schools.

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[R. I. 1224-1225, Vol. 12] And just so I will understand your testimony are you characterizing this practice in the late '50's of putting Mad River Township students in the three schools geographically closest to that area as being somehow improper on the part of the Board of Education?

A. I say it is indicative of practice of not considering the assignment of white students to black schools.

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[R. I. 1355-1357, Vol. 13] Q. I show you Plaintiffs' Exhibit PX-5A. With reference to the assignment of both black and white teachers, new hires and transfers, could you give me what PX-5A shows with relationship to their racial assignment?

A. For 1968-'69 only?

Q. Yes.

A. It shows that Negro teachers assigned to schools with predominantly white enrollment numbered 40 and white teachers assigned to the same white schools numbered 223, and Negro teachers assigned to schools with predominantly Negro enrollment numbered 95, and white teachers assigned to schools with predominantly Negro enrollment numbered 64.

Q. Now, these are teachers; is that correct?

A. These are teachers.

Q. And is this the kind of study that later developed by which you became aware of the continuing extent of the factulty segregation?

A. Yes, it is obvious in terms of the new hires and transfers for that year the predominating pattern was the assignment of black teachers to black schools and white teachers to white schools.

Q. Now, you testified that you hired a certain number of black principals over that first summer you were here.

A. Yes.

Q. And then you assigned all principals in all schools for the fall; is that correct?

A. Yes.

Q. And did you for the first time assign a black teacher out of West Dayton?

A. A black administrator.

Q. Black administrator, I beg your pardon.

A. Yes, across the Miami River.

Q. And did that single assignment eradicate the pattern of identifying schools as black or white by the assignment of administrators?

A. By no means.

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Q. Now, with respect to PX42 about which reference has been made on cross-examination, could you tell me what PX42 is?

A. This is the assignment of non-teaching personnel by categories and schools and race.

Q. Now, you testified on cross-examination that there was a distribution on a racial basis in the school system.

A. Yes.

Q. Could you tell me what that distribution is?

A. In the high schools, for example, the assignment of non-teaching personnel alone would identify the school as white or black with respect to its pupil enrollment.

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[R. I. 2107-2111, Vol. 20] Q. Are you aware of instances or practices of the State Department of Education whereby accreditation or chartering of particular schools or school districts has been withheld or threatened to be withheld by the State Department of Education?

A. Yes. At the time that I joined the Department, the Legislature had just required that all districts of both elementary and high school – there were about 50 elementary districts – that were in the process of being notified of the necessity to join with another district in order to remain chartered. There was a reduction in the number of school districts for each of the years that I was in the school district by consolidation, and in some of those cases, this would be the result of inspection of schools unable to meet minimum state standards, and therefore required to be consolidated with another district.

Q. In general, Doctor, if a school district did not meet State educational criteria, or if a particular school did not

meet educational criteria, the State Board of Education had the power to revoke the charter, is that correct?

A. That's correct.

Q. Or to fail to grant a charter?

A. Yes.

Q. Would its failure to provide equal educational opportunity be greatly dissimilar of its failure to provide other educational opportunities in your opinion?

A. No. Indeed, in the opinion of the Attorney General, that was a definition of the law, that the State Board and the State of Ohio were required to report them.

Q. That was the 1956 Attorney General opinion that has been referred to already in this cause?

A. Yes.

Q. And the State Board for various educational reasons did so act, is that correct?

A. Yes.

Q. Now, with reference to any particular city-wide schools, did it act in that regard?

A. Indeed, in the creation – well, let me state just for city-wide schools and discuss a situation in Middletown, Ohio, where an exception was asked with respect to the construction of a new school and the proposed chartering of that school which would have resulted in two high schools in the city, one predominantly white and one predominantly black.

The request was that the schools be chartered as one institution on two campuses so that all students would go to both schools and therefore both institutions would be integrated, and such was approved.

Q. If they had been chartered separately, then they would have been segregated schools? They would have each had all the grades, is that correct?

A. That's correct.

Q. So the State Board did in effect adjust, which might be a word that could be used, its accreditation criteria in such a way as to set up a pairing of schools in effect, is that correct?

A. That's correct.

Q. With regard to the State Department of Education's advice to the Dayton Board that its present middle school plan was racially in violation of desegregation requirements, did the State Board take action under their authority to deny accreditation to those schools?

A. No.

Q. Could they have done so?

A. In my judgment, under the premise of the Attorney General's opinion referred to earlier, yes.

Q. And under the practices which they engaged in, you were setting up in effect a new school, were you not?

A. Yes.

Q. And you made Whittier, for example, a middle school? That was a new school that had to be chartered separately or differently?

A. With the exception that the law in 1966 provided as I think I testified earlier, to the fact that school districts are now chartered in toto, so that this was not a chartering matter, but it still is a matter of meeting minimum standards regardless. The whole district, in other words, is liable, not just a single building.

Or to put it another way, if a single building is not in compliance with the requirements of the State, then the whole district is in effect liable to lose its charter.

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[R. I. 2135-36, Vol. 20] [Following is proferred testimony of Wayne M. Carle] A. Metropolitan Dayton. I think it was 52,000 were going to school by bus and perhaps four to five thousand as far as the public school pupils are concerned were within the city and the rest would be outside the city.

Q. Now, a lot of those would be in rural areas or what, heavily urbanized areas?

A. All of the metropolitan area would certainly have to be regarded as urbanized. There are conditions within the Dayton School District that are identical to those that would exist in many of the suburban areas. For example, the City

of Kettering or the City of Oakwood, when we are driving down the street between Dayton and Oakwood, there is no difference other than the corporation sign or difference in the spacing of the housing of the schools. On the other hand, we have some areas within the school district that would be characteristic of some more suburban areas; that is, the area in the Meadowdale or Belmont area would have some characteristics like those of unincorporated or perhaps more peripheral areas of the metropolitan region.

Q. Now, you mentioned Meadowdale. How many pupils do you transport at Meadowdale?

A. At the high school level, something over 850 pupils are transported to Meadowdale High School. There is also transportation to some of the elementary schools in the same area. This would include, for example, Meadowdale Elementary where approximately 85 pupils are transported. There are other schools, you understand, in that cluster of schools in which there is also transportation. I just gave an example.

Q. Do you transport children to Lewton School?

A. Yes, Lewton is in the far east side of the district and something over 400 pupils are transported on what we call D-contracts. That is, parent transportation is provided.

Q. Many of those are Board owned buses?

A. Yes. To maximize the efficiency of the small number of Board owned buses, they are concentrated at one area of the city, largely in the east.

Q. Fairview High School, does it have some students transported to it?

A. Yes, Fairview has in the range of 300 pupils transported.

Q. Belmont?

A. Belmont has had a large number of pupils, something in the range of 680 or more.

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[End of proffered testimony of Wayne M. Carle]

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[R. I. 1374, Vol. 14] Q. Dr. Carle, are optional zones a sound administrative device for assigning pupils to schools?

A. I wouldn't characterize them as useful, no.

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R. TESTIMONY OF LLOYD LEWIS, SR.

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[R. I. 1383-1385, Vol. 14] Q. If you know how they were assigned, tell me the source of your knowledge.

A. If you were a student in Garfield or Willard, it was automatic. In my case, my children were in Wogaman. We could apply for other schools.

Q. You say you could apply for —

A. My children stayed in Wogaman. That was it, in that case.

Q. All right. When they came to high school age, do you know where their records were sent at that time?

A. Automatically they were sent to Dunbar.

Q. All right. And did your children attend Dunbar?

A. No. I applied for Roosevelt.

Q. And you say you applied. Did you ask that there be a transfer of your children to Roosevelt?

A. Yes.

Q. But your children's records were sent to Dunbar, is that correct?

A. I have no knowledge of where they were sent. I was aware of that fact, and I saw to it that they went to Roosevelt.

Q. So you asked for a transfer to Dunbar from Roosevelt?

A. To Roosevelt.

Q. In working with the students in the community, did you also work with teachers in the schools?

A. Yes.

Q. All right. Were you familiar with the general practice to the assignment from Dunbar from your work in the community?

A. Yes.

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Q. From your work in the community, did you have knowledge in general of how black children got to Dunbar?

A. Yes.

Q. And how was that?

A. Automatically they were sent if they were black.

See, that was the design of the school, the same as Christian Atticus in Indianapolis.

Q. Were you a member, sir, of an organization called Frontiers?

A. I was.

Q. Did you hold some positions within the organization?

A. I was Chairman at one time.

Q. All right. Are you familiar with any actions taken by the Frontiers, vis-a-vis the Dayton Board of Education with respect to integration of schools?

A. I was.

Q. And had that organization called upon the Dayton Board to take action in that regard?

A. I don't understand the question.

Q. Had the Frontiers asked, demanded or what-have-you, that the Dayton Board of Education take steps toward integration of the Schools?

A. Definitely.

Q. All right.

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[R. I. 1389-1390, Vol. 14] Q. And when were your own children in Wogaman Elementary School, Mr. Lewis?

A. It must have been in the year — they went to high school in '40, so you would have to go back about eight years.

Q. So it would be in the late '30's?

A. Early '30's.

Q. Early '30's?

A. Yes.

Q. And at that time was Wogaman essentially an all black elementary school?

A. No. Wogaman had integrated.

Q. Do you have any idea of what the composition of the student body of Wogaman was back at that time?

A. It was largely white at that time.

Q. All right. And you asked that your children go to Roosevelt High School, and that's where they went, isn't that correct?

A. In 1940, right.

Q. Now, I think you have indicated that you don't know where the records for your own children were sent after they completed their elementary education, isn't that correct?

A. That's correct.

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S. TESTIMONY OF GORDON FOSTER.

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[R. I. 1395, Vol. 14] Q. Dr. Foster, in connection with your teaching at Miami of Ohio, did you have occasion to work in any of the schools in the Dayton City School System?

A. Fairly extensively in this general area, the Metropolitan area. I supervised student teachers for three years, I think. I think during that time it was all – well, not all but many of the districts in this area, particularly Kettering and I can't remember whether I had any in the City of Dayton or not, but in this general area I got fairly familiar with schools. I taught extension classes for the University at Roth High School, I believe, for two years, and then at Wright State for a year when they opened that facility and transferred the extension classes over there.

Q. You say you taught at Roth. That was at night?

A. They had evening and afternoon classes both. I believe mine were in the late afternoon, and I have also taught extension classes in connection with some of the suburban schools. Trotwood, for example, is one I can think of, and

in connection with my duties at Miami University for a period of four or five years, I worked quite a bit with Dr. Purdy in the Bureau of Educational Field Services and did quite a bit of work in this general area in studying school district education.

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[R. I. 1402, Vol. 14] Q. Dr. Foster, you were the author or supervisor of the preparation of the plan of desegregation for the City of Dayton; is that correct?

A. That's correct.

Q. In connection with the separation of that plan, can you tell me how much time you spent in Dayton?

A. As I remember it, I had one person working with me on that, Mr. McDonald, now Dr. McDonald, and the two of us spent a total of something like 11 or 12 days in the city plus a good deal of time in Miami, but actually on site, I think it was 11 or 12 days, and I spent all but – well, I think all but four of those days. I spent seven or eight days on site at that time.

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[R. I. 1419-1420, Vol. 14] Q. All right. You listed optional attendance zones.

Is there any relationship between those two?

A. Yes, sir. Very similar. It is partly a semantic situation. But when you have an optional zone, in almost every case it has to be carved out of one of the two zones in which it is optional, one of the two attendance areas in which it is optional, and therefore it automatically becomes a sort of dual zone or, as you will, an overlapping zone.

Q. Dr. Foster, have you at our request studied the pattern of new construction in the Dayton School System?

A. Yes, I have. When you say new, what I have studied primarily is, from 1950 to the present.

Q. What has been your observations of the facts of the pattern of school construction, new school construction in Dayton, from 1950 to the present?

A. May I refer to my notes?

Q. Yes, please.

A. In making an analysis of new construction from 1950 to the present, I have before me Plaintiffs' Exhibit No. 4 and also the overlay PX-53A, which had to do with new construction and additions.

I made a slightly different analysis than the one presented in PX-4, in that I carried it through to figures for 1972-'73, whereas if I'm not mistaken PX-4 used attendance figures for last year, for the '71-'72 year.

What I found in new construction was, to summarize briefly, there were 24 schools opened from 1950 to the present. Out of the 24, 22 opened at 90 percent or more black or white. That is to say, only two of the 24 schools opened as facilities without being either 90 percent white or 90 percent black.

Of that 22, I found that seven schools opened 90 percent or more black and remained so today.

Most of them are at either the 99 percent or 100 percent black level.

Six of the schools opened at 90 percent or more white and remained so today, and of the 22, nine schools opened at 90 percent or more white, and today these nine schools range from something like 17.7 percent to 96.7 percent black.

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[R. I. 1422-1423, Vol. 14] Q. In response to the Court's inquiry, Dr. Foster, you did say it does have something to do with segregation?

A. That's correct.

Q. Does it have something to do with school segregation?

A. Yes, sir, in my opinion.

Q. Dr. Foster, in counting the schools for new construction, did you count, for example, the Jefferson Primary as a new school?

A. I believe I did, yes, sir.

Q. And the same would be true for the other primary units?

A. Yes, but I think there was one case that was sort of questionable and that was Allen Primary which in some document is listed as a primary unit and in some merely as an addition to Allen. In my data I counted it as an addition rather than as a separate unit.

I believe it has the same administration addition in the regular unit.

Q. All right. Can you identify for me the seven schools which opened 90 percent or more black and remain so today.

A. All right. Residence Park Primary opened in 1966 at 96.5 percent black, and in 1972 it was a hundred percent black.

McNary Park opened at 100 percent black in 1964 and is still a hundred percent black.

Jackson Primary opened in 1960 at 99.9 percent black and is currently 99.7 percent black.

The new Dunbar High School opened in 1963 at 92.7 percent black and is currently 100 percent black.

The Carlson Elementary School opened in 1958 at 95 percent black and is currently 99 percent black.

The Louise Troy facility opened in 1957 at 100 percent black and is 99.1 percent black in 1972.

Miami Chapel, which is adjacent to the Louise Troy facility, opened in 1953 at 100 percent black and is currently 99.8 percent black.

These percentage figures at opening, I took from Plaintiffs' Exhibit PX-4, for the most part, and in some cases, I believe, or I think in all cases, they are substantially correct. There may be a percentage point or so deviation.

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[R. I. 1425-1428, Vol. 14] THE COURT: Let me put the question to you another way. Do you build schools where the children are or do you build schools where you think the children should be? That is, do you build the school someplace else because it is a nonsegregated neighborhood and then

transport the children there, or do you build them where the children are?

THE WITNESS: Well, I think school systems have done both.

THE COURT: Yes. I understand. But I would like you to relate it to the Dayton situation.

The schools you have named are in an area that is predominantely black and has been, according to the census tracts, for quite some time.

I ask you again, would you build schools there or would you build them someplace else and move the children to the schools?

THE WITNESS: Well, in terms of desegregation I would consider very seriously not building them where the children are but considering other possibilities of site selection, because I think that in building them where the children are the Dayton System has managed to lock in and compact both the school population and the residential population in the inner city, and at the same time to promote housing segregation and school segregation in the far-flung suburbs.

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BY MR. LUCAS:

Q. Dr. Foster, would you identify the six schools which opened 90 percent or more white and remain so today?

A. All right. These would be Shoup Mill, which opened in 1958, 100 percent white, now 3.8 percent; Belmont High School —

Q. Excuse me. 3.8 percent black, is that correct?

A. I'm sorry. 3.8 percent black.

Belmont High School, which opened no percent black and is currently 5.2 percent.

MR. GREER: While we are giving those, I suppose we ought to have the dates. 1956?

A. (Continuing) I'm sorry. Belmont was 1956 and Shoup Mill was 1958.

Meadowdale Elementary in '57, which opened no percent black, and is currently no percent black; Horace Mann Elementary, opening in 1954 at no percent black and is currently 3.1 percent black; Orville Wright opening in '52 at no percent black and currently 8.1 percent black; and Eastmont opening in 1955 at no percent black and currently 0.7 percent black.

Was that six?

MR. LUCAS: I think so, Doctor.

THE COURT: Yes.

BY MR. LUCAS:

Q. Directing your attention to Meadowdale High School, is it just slightly over the ten percent figure you used?

A. My data give it at 10.6 percent black this year.

Q. And it opened at 0 percent?

A. That's correct.

Q. And Belle Haven?

A. Belle Haven opened in 1954 at 0 percent black and is currently 17.7 percent black.

Q. Dr. Foster, turning your attention now to the building additions. Did you examine those?

A. Yes, I did, sir.

Q. Will you give us the results of your examination?

A. All right. Again, in compiling these, I used Plaintiffs' Exhibit 4, and also the Ohio State, the recent Ohio State report, which did list the dates of all the buildings and additions as sort of a cross-reference.

THE COURT: Before you do that, Doctor, I would like to address another question, because I must confess I am truly confused with this line of testimony.

If there is something wrong with opening a school that is 90 percent black and something wrong with opening a school 90 percent white, then I assume the next step is that schools should be selected that are more equal. And so let's assume for a moment that these 13 schools were all located in sites where they are precisely 50 percent white and 50 percent

black, or in view of the city's population, 30 percent black and 70 percent white.

Every one of these schools was open at that point. Within five years, by reason of situations over which the Board had no control, they all were then 100 percent white or 100 percent black.

Would you describe that then as a segregative intent by the Board?

THE WITNESS: Well, I think intent is hard to prove in some cases, but I think it might be described as a mistake in judgment.

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[R. I. 1437, Vol. 14] Q. Thank you. Would you go now to the building additions and the inquiry which you made?

A. According to my figures, if they are correct in terms of building additions, in terms of 1950 to the present, there were 62 separate school additions made in the Dayton System.

Q. Now, Doctor, just a preliminary thing. If there were two separate additions made to the same school, is that included in your 62 figure?

A. That's correct. Some of these are multiple listings, some more than two. Some may be three or four.

Q. So, if they made an addition in 1954 and another one in 1960 and another one in 1968, you would have three individual notations although there might be only one school listed?

A. That's correct.

Q. And that's how you get your 62 total?

A. That's correct.

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[R. I. 1439-1442, Vol. 14] Q. Did you make a separate analysis of that or was the analysis made in conjunction with other studies in particular areas?

A. Well, both but I do have a separate analysis of this criterion. The criterion works in a sense in both directions. You can keep schools open to maintain segregation, and sometimes when you close schools, what you do with the pupils who have been assigned to the schools being closed is an important factor. In terms of keeping schools open to maintain segregation, I had access to the Touche-Ross and Company document made in 1972.

Q. Excuse me, Doctor.

A. I don't know whether that has been submitted as evidence or not.

Q. I believe it has. What is the Touche-Ross study?

I think it has been referred to several times. Can you tell me what it is?

A. I believe the title, at least, as I have it is the Business Operations Review Report.

THE COURT: Mr. Lucas, do you have an exhibit number on that?

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MR. LUCAS: It is Exhibit 56, Your Honor.

THE WITNESS: There is a feeling among many people, particularly school board members around the country, that schools are pretty inefficient and inefficiently run in their business operation, and it is quite a sound and reasonable technique these days to ask business people to come in and evaluate your operation and help you in terms of suggesting ways if money can be saved because finances in education are very important as always, and this is my understanding of the background of this study. The part I was particularly concerned about was the recommendation to the school system that they could phase out nine average schools and save something in the neighborhood of $700,000 to $900,000 annually by so doing. When I made the desegregation study in December of 1971, one of the recommendations in our report was also to close three elementary schools and one secondary school, and the reason we didn't recommend more was because we really didn't have time and that wasn't our major purpose. We didn't have time to analyze the buildings and so forth, but we were aware of a current situation where the projection for students in Dayton is one that is declining and the current

situation of over capacity being available at both the elementary and secondary level on a city-wide basis, and in this situation where you have as in almost all instances considerable number of very old school buildings, I think it is intelligent to look at the operating expenses and so forth and see if any of them can be closed out. I also had access to Plaintiffs' Exhibit 61 which is a report that Mr. Weinman made in April of 1972 to the Superintendent in regard to our recommendation in the desegregation study of closing Hawthorne and Fort McKinley and Washington Elementary Schools. Out of reading these and also my contact with Dayton in December of 1971, it is my opinion Dayton could very definitely close some obsolete schools which were, for the most part, segregated schools and reassign the students so as to promote desegregation. There was one instance which I feel is a good example. There may be others of the Dayton System closing schools and then reassigning students in such a way that promoted segregation rather than desegregation when they very definitely had options that could have done the other. This was in 1962 in the case of closing Garfield and Willard Elementary Schools. It is my understanding that the students from Garfield and Willard were reassigned most of them to MacFarlane which opened in the same year and which, I believe, was the old Dunbar High School which was at that time 100 percent black which at least in 1963, the following year, had 100 percent black faculty. Students were also assigned to Irving which was 96.6 black, and in 1963 had a 50 percent black faculty, and to Miami Chapel which was 99.6 percent black and in 1963 had a 93 percent black faculty.

Now, if you look at the map very briefly in terms of distances, if you look at MacFarlane and Irving and Miami Chapel which are in sort of the south central area of the city, it is possible that these children could have been assigned to Patterson or to Hawthorne. That's Patterson Elementary, of course, or to Longfellow which are about the same distances from the schools being closed and which in 1963, the year after, were white schools. Patterson was all white and Hawthorne was all white and Longfellow was 6 percent black or predominantly white.

All I am saying in this example is that here we have closing of schools in which students are reassigned and in their reassignments sent to situations in receiving schools where segregation is either increased or maintained when they could be sent to equal distance schools in which desegregation would be effected.

* * *

[R. I. 1448-1449, Vol. 14] Q. And what was that inquiry?

A. In terms of the use of site selections to maintain segregation, in the new construction sites from 1950 which we have already discussed to the present, many of these have helped to promote and to impact and lock in segregated or isolated situations either in the inner city or in the suburbs, and I think this is true in terms of both school segregation and housing segregation, that is, in terms of its effects. First of all, in the area of the white suburban expansions which are farthest from the center of the city which is all black, and these were, of course, more inaccessible at the time of construction than they are now. We have Valerie which was built in 1966 which is almost at the extreme north of the district. We have Meadowdale High School built in 1960 and Meadowdale Elementary built in 1957 to the north of the district. We have Shoup Mill built in 1958 and to the nearly extreme north. The south and east of the furthest white suburban expansion, we have Eastmont, on the extreme east built in 1965. We have Wilbur Wright to the northeast built in 1952, Horace Mann to the southeast built in 1954, and Belmont High School in the southeast built in 1956.

Now, contrary-wise, in the inner city during this time there were a couple of examples of schools which were built into locked-in situations in terms of segregation, and in fact these schools were surrounded by other schools which were all black. That would be McNary in 1964 and Jackson Primary in 1960.

Q. Dr. Foster, in your experience, use of the primary unit in close proximity to elementary schools, has this been a

matter reflective of segregation practices in your experience?

A. Yes. It is in a sense very much nothing more than an addition. They are on the same campus and for all practical purposes they are really one school.

Q. What effect does this have on the existing racial concentrations?

A. Well, it tends to secure it and to further insure that those schools are going to remain segregated and that the system as a whole is going to remain segregated.

Q. Do they tend to have the same boundaries as the existing elementary school?

A You are talking about the primary?

Q. Yes.

A Yes, they do.

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[R. I. 1453-1455, Vol. 14] Q. All right. How did you understand that the option worked between Residence Park and the Carlson area?

A. My understanding was that the students, and I don't know the exact date of the inception of this optional zone, but it is given on the data that was used to make this overlay.

The students have the alternative of going either into Jacksonn or into Residence Park.

We have studies exhibits for the Defendants, DXCP, which I believe gave the attendance at Jackson from 1957 to 1972 for the VA children, and that figure was zero. Defendants' Exhibit DX –

Q. Excuse me, Dr. Foster. What was the racial composition of Jackson?

A. Jackson in 1951 was 35.9 percent black.

Q. And in 1957?

A. In 1957 I don't have the figure. In 1963 Jackson was 98.5 percent black.

I believe Mr. Rivers testified, and I believe that he was at Jackson, that Jackson did have a few white students, and at Residence Park in 1957 it was basically white.

I'm not sure whether those are his exact words, but that's the substance of it.

Q. Jackson was a black school and Residence Park was a white school, and Defendants' Exhibit CP indicates no child from that optional area of the Veterans Administration Center in attendance at Jackson, is that correct?

A. That's correct.

Q. What about the attendance of children at the white Residence Park Elementary School? Did you examine Defendants' Exhibit CO?

A. I did, yes, and those figures were for the same years at Residence Park, and the attendance of VA children given in that resume from 1957 to 1972 was a total of 48 children, 8 of whom were black, five the race of whom were unknown, and 35 were white.

Most of these actually were in the late 1950's.

Q. What was the effect of that optional zone at that time, the Veterans Administration Hospital?

A. Well, it allowed the white students in that optional zone to attend white schools. I believe that was Residence Park.

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[R. I. 1455, Vol. 14] Q. Dr. Foster, I believe in earlier testimony you referred to the manipulation of zone lines.

Did you make any study of this type of practice in the Dayton School System?

A. Yes, I did.

Q. Perhaps since I believe in going into that we would get into optional attendance zones, would you first of all, and I'm backtracking, tell me what exhibits you used and what maps you examined and indicate some of the optional areas which you identified between schools of opposite race?

A. In the optional zone criterion, I examined the various overlays and base census maps. I believe in terms of exhibits the one that is currently on is the elementary '57 overlay, which would be PX-47A, and the ones following that in terms of dates at both the elementary and high school and middle

school level, and the different base maps, starting with the PX-46A, I believe, having to do with the ten-year census data.

I also examined other exhibits having to do with Board decisions in creating optional zones.

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[R. I. 1457-1458, Vol. 14] Q. You do have that data as to those other five, is that correct?

A. Yes.

Q. All right. Would you list them, giving us the name of the school and the racial composition?

A. All right. The first group that I established was created in 1953 by the Board.

One was Willard and Irving. This was in the Board minutes, Plaintiffs' Exhibit 123. Willard at that time was 100 percent black. Irving in 1951 was 46.6 percent black.

The second one was Jackson and Westwood established in 1953. Westwood was 0 percent black and Jackson, in 1951, was 35.9 percent black.

The third one was Whittier and Willard. Willard was a hundred percent black and Whittier, in 1951, was 29.9 percent black.

A fourth option was Whittier and Miami Chapel. Miami Chapel was 100 percent black in 1951. Whittier was 29.9 percent.

A fifth one was Wogaman and Highview. Wogaman was one of the all-black schools, and Highview, which was opened in 1951, I believe –

Q. Excuse me. Going back to Miami Chapel: Can you check that year with the year that it was opened?

A. Well, the '51 may apply to Whittier and not to Miami Chapel. It may have been opened a year or so later. I think it may have been opened in '53.

That's correct. Miami Chapel was opened in 1953 at 100 percent black.

Highview was opened in 1951 at 1.7 percent black.

The sixth in this group –

Q. Highview was with Wogaman, is that correct?

A. That's correct.

Q. And Wogaman was 100 percent black?

A. That's correct.

Q. All right. The sixth in the group was Edison and Jefferson optional zone, which was not listed in the Board minutes in PX-123, but it does appear on the elementary '57 map.

In 1951 Edison was 43 percent black and Jefferson was 0 percent black.

Q. Excuse me, Dr. Foster. Are you dividing these by years?

A. Well, sort of by the groups as I described them earlier. The three high schools, the six elementary schools that were developed in '53, and then the balance.

Q. All right. Fine.

A. The three high schools were Roosevelt and Colonel White.

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[R. I. 1461, Vol. 14] Q. In examining the other data and the depositions which you have listed, did you determine any of the other operative facts with respect to the way in which this optional attendance area worked?

A. Yes. We do have hard data in Plaintiffs' Exhibit 15-A, I believe it is, giving the number of optional area students attending Colonel White by years. In 1959 there were two blacks and 186 whites. In 1960, two blacks, 284 whites. In 1961, two blacks and 304 whites. In 1963, six blacks and 360 whites.

And our next date shows quite a change in the direction. In 1968 there were 216 blacks out of the option attending Colonel White, 191 whites. 1969, 245 blacks, 109 whites. In 1970, 298 blacks and 75 whites.

Q. What had happened to the total racial composition of Roosevelt at this time?

A. Roosevelt had become an all-black school and Colonel White partially so.

Do you want those figures?

Q. Do you have the figures for Colonel White, 1968-'69?

A. Not on this sheet, but I have it.

1968-'69, Colonel White was 19.3 percent black.

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[R. I. 1472-1473, Vol. 14] A. You mean from a general school administration standpoint?

Q. That is correct.

A. In my opinion, it is an important administrative device.

Q. Why is that?

A. Whether it is racially connected or not racially connected. Well, essentially I suppose like anything else in administration, what you are establishing is a rule, and then you start making exceptions to that rule and you make one exception for one group and another group wants an exception, and before long you are in an administrative nightmare. If I can cite one example quickly of this in Dade County which is the sixth largest system in the country, when we worked with them on their HEW compliance about three years ago, the present superintendent asked us to recommend immediately that all optional zones be erased and they had something like well over 150 of them which I believe the previous superintendent had established. I cite this as an example that there were some racial zones, but essentially it was this administrative's feeling that it would just be gotten rid of and it would be a much better situation for the School Administration generally.

Q. In what way do optional attendance areas affect desegregation and the stability of pupil assignment to particular schools?

A. Well, essentially in my opinion they create instability in the public in one way in terms of housing choices where there are choices and in terms of perception of whether a school is going black or staying white, this sort of thing, so that generally where you have an optional zone which has racial implications, you have an unstable situation that everybody realizes is

in a changing environment. So, what it usually does is simply accelerate whatever process is going on or work toward the acceleration of the changing situation.

Q. The optional attendance zones which you have identified in your testimony today, what is your opinion with respect to the effect or if there is any effect on racial composition of schools in Dayton?

A. Well, in my opinion, these accelerated and precipitated further segregation, and in those cases where I was able to cite hard figures, I think that is very definitely borne out, and I have no reason to believe that in all the other cases the same thing was true although I can't cite actual pupil figures from year to year because they simply aren't available.

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[R. I. 1479, Vol. 15] Q. Dr. Foster, with reference, first of all, to the option attendance zones, you described certain effects.

Are there short term as well as long term effects of the utilization of optional attendance zones?

A. Yes. In the ones we talked about at the high school level, if we can cite the Roosevelt-Colonel White optional zone, and the following Colonel White-Kiser optional zone, the short term effect it seems to me is to allow whites to move out of a school assignment that is becoming black, and I should point out that this is not to say that in many cases that at a certain point blacks also take advantage of this option.

In the Colonel White-Kiser situation, for example, as Colonel White has become blacker, we are at the point where there are no whites apparently opting now to go to Colonel White.

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[R. I. 1481-1483, Vol. 15] Q. Turning now, Dr. Foster, to the criterion manipulation of zone lines which you described, will you first of all tell me how you go about examining and what you would include within the definition of changing or manipulating zone lines? For example, would you include, say, new construction, for instance, as a zone line?

A. We would because generally unless there is a clear substitution of an existing school by a new school, new construction, for example, on the same site or virtually on the same site, you do have changing boundaries in the attendance zone when you set up new construction so that is very definitely a new factor. Essentially, the way you examine this is to take whatever data is available in terms of maps or descriptions of zone boundary lines and simply decide over a period of time how they have changed if at all and to what purpose they have been changed.

I did find, I think, in my examination of this in Dayton that attendance zone lines have remained relatively stable over the past 20 years and especially in comparison to many other systems that I have obesrved.

Q. All right. In light of the stability of the pattern – well, perhaps before we get to that because I will want to come back to that later – did you examine in particular the West Dayton area in light of this concept?

A. I did.

Q. And in examining the area and in terms of understanding what happened there, did you have to deal with some of the other criteria you have already discussed such as optional attendance and so forth?

A. Very definitely all the criteria because in almost every instance, the criteria worked together rather than working in isolation.

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THE COURT: Before you do, let me ask a question: Anytime a school system builds a new school, this by definition requires a change of attendance lines, does it not?

THE WITNESS: Not always. If you have, as I tried to explain and didn't do a very good job, if you have a building, a new building replacing an old building, sometimes they will maintain the old building while they are completing the new construction, and as soon as they get the new one finished,

then the kids simply move over into the new construction. The old building is either razed or used for other purposes.

THE COURT: Absent that, Doctor, assuming a situation where you build a new school that is not a replacement, as population shifts geographically you build a new school. That must include a change of a boundary line.

THE WITNESS: Correct.

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[R. I. 1485-1505, Vol. 15] Up on the small board is the census map of 1950, Plaintiffs' Exhibit 26B, and the elementary overlay of 1957, which is 47A, is that correct?

A. Yes, sir.

Q. All right, sir. Can you tell us what your analysis was in the Dayton area of the changes in boundaries?

A. Plaintiffs' Exhibit 75 points out that at this time, I believe in the winter of 1962, in December – no, 1952, in December, the Board went about making some decisions about redistricting and building and so forth in the west side schools. Some of these decisions had obviously already been made.

There were apparently two alternatives which were termed Plan A and Plan B, and the Board opted to go at this time with Plan B.

In describing this situation, I would like to not only talk about zone lines and changing zone lines, but also school additions and the other factors I have been discussing in concert with the zone line situation, and I think I can be very brief about doing this, but doing it in such a way that the interrelationship and the connection will be made, because it is very difficult to consider any one of these factors in isolation from the other factors.

It is very much more of a gestalt type of arrangement.

So in Plan B, the decision was made to decrease the Wogaman attendance areas.

Q. You are talking about the 1953 and this 1957 map is a result of Plan B, is that right?

A. Yes. This map shows Wogaman at this stage, and it was much larger, of course, in 1953, or '52, prior to the change.

Wogaman was decreased, and the Jackson zone, which is immediately to the north of Wogaman, was added to, and the Weaver zone, which is to the north and east of Wogaman was added to.

At the same time Willard, which was one of the schools in consideration, and I might say that Willard and Garfield and Wogaman at that time were all black schools, but Willard was kept the same; Garfield, which is just to the north of Willard in a fairly compact residential area, obviously because of its small size, was decreased and additions were made to Edison to the direct north of Garfield, and to Irving, which is to the southeast and can be seen on this map with quite a bit of green in this area.

Now, in discussing this move, the racial proposition of the schools which were added to according to the 1951 data, which was just two years prior to the move actually, Jackson, which took this part of Wogaman, was at 35.9 percent black in 1951, Edison was 43 percent black. For the schools that took part of Garfield — I beg your pardon.

I need to go back to where I ended with Jackson which took in part of Wogaman.

Weaver took in the other part of Wogaman. Weaver was at 67.6 percent black in 1951.

Q. Let me stop you at that point.

Wogaman was all black, so that any area taken in would have been black, is that correct?

A. That's correct.

Q. And the Jackson percentage was at that time what?

A. 35.9 percent black.

Q. And Weaver was sixty —

A. — 7.6.

Q. All right. So that was the 51 enrollment, is that correct?

A. That's correct.

Q. So they added from the black enrollment at Wogaman initially black students?

A. Yes. And the result obviously would be to increase the black percentages in those two schools, since the territory being transferred was all presumably black pupils.

The two schools that took from Garfield were Edison, which in 1951 was 43 percent black, and Irving was 46.6 percent black.

Garfield, of course, was also an all-black school.

Q. Would this have any effect, Doctor, of adding blacks to those other schools?

A. Presumably, since all the territory taken in was black residential area.

Q. All right. Doctor, in terms of the system as a whole, how did these schools to which black students were added compare with other schools in the system in terms of their black-white enrollment?

A. In looking at the 1951 data which we have, outside of the all-black schools we are concerned with, Wogaman, Willard and Garfield, the four schools of Jackson, Edison — Edison here, Weaver and Irving were the four highest percentage elementary black schools in the system.

Now, at the same time it is important to note that in 1953 we did discuss this in our openings, that Miami Chapel, which had been formed out of the Wogaman district or zone, opened as a 100 percent black school with pupils in 1953, which would be the same time these changes were made.

In terms of teaching staff which is one of the criteria involved in this analysis, according to the data in PX-3, Plaintiffs' Exhibit, by 1957 three or more black teachers had been assigned to Edison, to Jackson, to Weaver, to Miami Chapel, to Highview, to Whittier, and to Irving, and, of course, the three all-black schools of Garfield, Wogaman, Willard had all-black staffs.

Q. Miami Chapel, did it have more than three black teachers?

A. I believe Miami Chapel opened up in 1953 with some-think like, if my memory serves me, 85 percent black teachers.

I don't know how many were on the faculty. So that in

terms of teaching faculty, in terms of race, it is clear that the faculty assignment indicated that the schools involved in this total configuration were either all-black schools or going to be black, predominantly black schools.

Q. Now, Dr. Foster, were there any black teachers assigned to the other schools in the system at that time?

A. I believe that those are the only schools, the ones I read, which had as many as three black teachers at that time, which was 1957. I'm not even sure whether the data indicated whether there were any less than three teachers. But at that time that was a rather significant number of black teachers to to be assigned to any school.

Now, if you look at another criterion which we have been discussing, that of building additions, and in looking at this total area, the west side area, we note that in 1954 and 1958 there were additions made to Irving which had received part of the Garfield territory.

In 1954 and '58 there were additions made to Edison which received the other part of the Garfield territory, and in 1954 and 1955 there were additions made to Weaver, which received part of the Wogaman territory. Another factor that is involved in this total gestalt would be optional zones.

In discussing optional zones, we will remember that I mentioned six elementary schools which the Board in 1953 had created optional zones.

All of those are in this complex. According to Plaintiffs' Exhibit 123, which is Board minutes, an optional zone was created between Whittier and Miami Chapel directly to the west of Whittier designated by the cross-hatch, and apparently from the map a territory, the zone was taken out of the Miami Chapel area which was formerly, of course, Wogaman.

Q. Now, the area within the zone, does it coincide with the color coding on the map?

A. The area in the optional zone between Miami Chapel and Whittier corresponds completely – it is in the shape of a triangle in the southeast corner of Miami Chapel. It corresponds with the green census data which is 5 to 25 percent black in 1950.

Q. Does the western boundary, the optional area, take out all of that green area from the Miami Chapel zone?

A. It does coincide as I see the map, with the line separating the green part of Miami Chapel zone and the red part to the northwest.

Q. Miami Chapel is 100 percent black. What was Whittier at that time?

A. Well, not at that time but in 1951 Whittier was 29.9 percent black.

Q. And what color appears in the Whittier zone?

A. Whittier has a little orange to the northwest. It has quite a bit of green to the west and to the north and about two-thirds of it is white, but this might be a bit deceptive because it appears from the map that quite a bit of that is not populated.

Q. What was the effect of the optional zone at that time for Miami Chapel and Whittier?

A. The effect would be to allow the blacks – pardon me – the whites in the southeast corner of Miami Chapel to attend Whittier which was essentially a white school at that time.

The second optional zone created – I beg your pardon.

Q. I think you have answered the question. Go on to the next option.

A. It was between Willard which is here on the map and Whittier which we have just been discussing, Whittier to the southeast of Willard. Willard in 1951, as we know, was 100 percent black, and as we have just said, Whittier was 29.9 percent black, and again this optional zone allowed the whites in Willard to attend Whittier.

Q. And the color in the Willard area at that point was what, orange?

A. Almost completely orange on the census in 1950 which indicates 50 to 85 percent black.

Q. There is another optional area apparently just above that. Can you describe that?

A. The optional area just north and a little east of that is between Willard and Irving. We said Willard was a 100 percent black school in 1951. Irving was 46.6 percent black. This allowed the white students in the northeast section where the zone is at Willard to attend Irving School.

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Q. Dr. Foster, just to clear this up for Mr. Greer, I believe you started your testimony indicating there had been a change in policy simultaneous with the adoption of many of these optional areas; is that correct?

A. I don't know whether I did, but there was a change, I believe, in the year 1952 by the Board which said there would be no more transfers.

Q. Now, your testimony goes that the orange area indicates the presence from the census of some whites in that area, does it not?

A. That's my assumption, yes. I think the part that is confusing is that the data for school population while it may give 100 percent black doesn't mean as we know in many cases that the children living in the area are all black because under the previous transfer rules, those children may have transferred out.

Another optional zone created in 1953 was the Jackson-Westwood zone which is to the north of Jackson and to the south of Westwood.

In 1951, Jackson was 35.9 percent black. Westwood was all white.

Q. Now, you said that Jackson had black students from Wogaman added to it as a result of the action in 1953; is that correct?

A. That's correct.

Q. And this option was created, I believe you said, by the Board in the winter of 1952?

A. I believe in December, yes.

Q. Do you know whether or not it was implemented in December or the following September? Do you know that?

A. I am not absolutely certain, but I am reasonably certain it was begun in September of the following year.

Q. All right. What was the effect in terms of boundary changes, if any, of the creation of that option between Jackson and Westwood?

A. Well, essentially it had the effect of shrinking the northern boundary of the Jackson elementary zone because the students according to the census map residing in the optional zone would probably have been white students since the area is designated by white which according to the map is zero to five percent black in the census.

Q. Dr. Foster, as I understand the optional attendance area as it works, the southern boundary of the optional attendance area is now the mandatory boundary of Jackson and people below there are automatically assigned to Jackson; is that right?

A. Yes, because all of the optional zone would be part of the Jackson attendance area.

Q. North of that they could go either to Jackson or Westwood; is that correct?

A. Since that is part of the zone, I assume so, yes.

Another optional zone that was created in 1953 was Wogaman, between Wogaman and Highview, and it is not clear on this map and I am not certain, but I assume it might be a one-street zone since I believe the maps do not indicate one-street optional zones. In any event, the zone is to the south of Wogaman and to the north of Highview. It would be indicated by the fact that there is a very minute —

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THE WITNESS: — very minute space between the two colors of blue, blue on the side and red on the north.

BY MR. LUCAS:

Q. When was Highview opened?

A. Highview was opened, I believe, in 1951 as a 1.7 percent black school.

Q. Now, the boundary, the northern boundary of High-

view and the southern boundary of Wogaman, are they related with the exception of the one street optional area you have indicated to any color coding on the map?

A. Yes. The boundary goes along on the western part where, in fact, the housing is. It goes along and divides on the north. The all-black section of Wogaman is marked in red which is 85 to 100 percent black on the census map, and to the south of the line is the blue of Highview which is 25 to 50 percent black according to the census data.

There is one final optional zone created at that time which brings the total to six. I don't believe this was included in PX-123, the exhibit of the Board's minutes, but it is on this map of elementary 1957, and I would assume that it was created either in 1953 or shortly thereafter, and that is the optional zone between Edison and to the north and northwest Jefferson Elementary Schools. This would be the optional zone which is covering completely the green color on the base census map, green being 20 to 25 percent black.

In 1951, we know Edison was 100 percent — I beg your pardon — we know Edison was 43 percent black and Jefferson was all white. The results of this as in the other cases would permit these white students in the optional zone to option for Jefferson rather than to go to the blacker school at Edison. This would as in the situation to the west of Jackson and Westwood have the effect of shrinking the northern boundary of Edison in this case.

Q. Dr. Foster, did you locate any particular alternatives that could have been done with respect to the Wogaman School?

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A. I did note a couple of alternatives. As examples, to the south we did have Highview at that time which as we noted was opened in 1951 at 1.7 percent black. And, of course, the point I am making there is the territory from Wogaman could have been added to Highview since it was in certainly a walking distance and very little difference between the two

schools. Another possibility might have been to use Grace A. Greene as a receiving school from Garfield. Grace Greene is actually — maybe a little closer to the Garfield building. It is about the same distance as Edison, and they are all within walking distance of each of the three schools. Grace Greene in 1951, I believe, was 6.5 percent black. This is merely illustrative of the fact that by making another choice the Board could have moved the black students to a much wider option at the time than they chose to do.

Q. Dr. Foster, just looking at the area as you have done in terms of the construction additions and new school construction of Miami Chapel and redrawing of attendance boundaries and creation of optional zones, what was the effect of the implementation of Plan B in West Dayton?

A. Well, I think the effect was clearly one of locking in and freezing this configuration including these schools into an all-black school situation.

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A. I did list three cases where schools were opened involving changing zones and one we have discussed in 1951, the Highview School, was opened just to the south of Wogaman with Wogaman 100 percent black and Highview opening at 1.7 percent black, and I believe that previously I stated that this zone line might have been changed to move more black students into Highview.

THE COURT: Excuse me.

Dr. Foster, I am concerned about the horns of the dilemma that a school board now finds itself on, because a previous witness testified that when you start moving black students into a white school, you merely accelerate the turning of that school into white.

Now, you have just suggested that an alternative would have been to move them into the Highview School. No matter what the school board would have done, is it not true that it would have had the effect of accelerating the movement of blacks into a school?

THE WITNESS: Well, let me say that I agree with some of what you are saying. The problem, as I see it in this type of situation, is essentially one of diddling around piecemeal with desegregation instead of attacking the problem wholesale and making clear that you are desegregating the entire system.

THE COURT: Would that involve transportation then?

THE WITNESS: In a situation today it certainly would, yes.

THE COURT: Is it fair to say, Dr. Foster, that from your analysis and your testimony that the only viable alternative to this would be a system of transportation of children, that anything else is mere a makeshift? I don't want to put the words in your mouth.

THE WITNESS: Right.

THE COURT: But I'm getting the feeling that there is only really one alternative in your opinion.

THE WITNESS: No. I think there is a second alternative. I guess that is redundant. There is an alternative. Rather than do it the way in which the Dayton Board did in addressing itself to this very real problem in west side, of a changing community, which certainly has housing overtones and all the rest, if the Board does take a stance as I suggested they could have in a couple of situations in this change, where there were white schools directly adjacent, the message clearly is to the community that the Board is doing everything it can, even though over the long run the results may wind up segregated, but at least it is doing everything in its power to maintain a desegregated situation.

I think the result of this is to produce more stability in real estate movements, in the general public's attitudes of, well, the whole area is going black, so you know, that's the way it is.

THE COURT: Doctor, there has been testimony here of a tipping point that has been used.

Do I understand that what you are now suggesting is that as long as the Board doesn't exceed the tipping point, it would

be satisfactory to adjust zone lines as an alternative to transportation?

THE WITNESS: Well, I'm not sure what your question is.

THE COURT: All right. It's possible that I'm using a term that I assumed was a general one in this field.

THE WITNESS: Well, it is. I don't agree with the concept because as far as I know there is only one piece of research that I have seen on this. There may be others. But Johns Hopkins did a research of tipping point some years ago in relation to desegregation on the assumption that there was a point at which there was a big movement of blacks, and the results of the research indicated this wasn't so; that if a certain area of a city is going to go black, then it simply goes black over a period of time.

THE COURT: Irrespective of the school board does?

THE WITNESS: No. It is simply a question of the school board contributing to the pattern and accelerating it and exacerbating the whole movement.

THE COURT: Well, any change such as you are now discussing that would have the effect of making a white school of a larger percentage of blacks becomes then a matter of degree, because witnesses have testified that there is a community perception and that after a student body passes a certain point it is perceived as a black school.

Now, if that is true, then the school board is faced with the problems of so adjusting the percentages as not to send black students to a white school, so as to make that perceived as a black school.

THE WITNESS: Well, to start with, I do think this is a controversial issue, and it is not the tipping point arrangement as a very popular concept with school people. I think they all would like to believe and do believe honestly in their own minds that a school – not only the community moves at a certain tipping point, but that the school itself is inferior once it gets a certain percentage minority group members, which I think is ridiculous.

But be that as it may, I recognize that a board in making decisions in these cases may be fighting a losing battle, and as I stated, I think the only secure solution and the only safe solution is to disestablish a dual structure in the entire system so that whites in fleeing or changing however you want to term it, meet the same situation wherever they go.

THE COURT: In other words, Doctor, do I understand you to say that the only real alternative, other than a constant adjusting and watching of percentages and so fourth, is transportation?

THE WITNESS: I think that would be involved in the final analysis, yes.

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[R. I. 1515-1516, Vol. 15] Q. Dr. Foster, we go now to your third example. If we can at this point, let's discuss the Roth and Roosevelt situation.

A. I believe we covered Highview and Gardendale. The Roth High School opened in 1959 which we can see on the large map to the west of the city.

Q. Do you want to step to the smaller map here, Dr. Foster. We have put up some new overlays. We still have 46C, the 1960 census, and 48D, the 1960 high school attendance boundaries.

A. That's correct. On this map Roth is located almost at the extreme west central portion of the Dayton System, and the boundaries are designated as I am pointing to the immediate east of the established 1959 opening zone for the Roth High School, we have Roosevelt High School adjoining Roth on the east. In terms of setting up these zones, the indications are that the Roth opening essentially took the whites, white students out of Roosevelt. The base census map indicates that the largest portion of Roth is in blue, almost all to the south and southeast and to the north is blue representing 25 to 50 percent black. All the other portion surrounding the school site itself is white indicating zero to 5 percent black, and on the 1960 census data, there is a small

section to the east of the zone and to the southeast of the building which is in orange representing 50 to 75 percent black whereas at that time Roosevelt in 1959 or in the 1960 census was almost entirely red indicating 85 to 100 percent black. We know from Plaintiffs' Exhibit 1 on admissions that Roth opened with 662 pupils and that the same year Roosevelt decreased by 602 pupils from the previous year. We know that in 1963 our data indicates that Roth was 53.5 percent black whereas Roosevelt was still close to all black being 94.5 percent black. We also know or assume from Mr. Kirk's deposition that there were some considerations given by the Board to race in the establishment of the Roth zone and in the erection of the building itself.

Q. Dr. Foster, if you will follow with me my pencil, the boundary of the original Roosevelt High School zone included this optional area between Colonel White and Roosevelt and went all the way to the now boundary of the northern boundary of the Roth School; is that correct?

A. Yes.

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[R. I. 1518-1520, Vol. 15] Q. We have now placed up high school attendance boundaries 1965, Plaintiffs' Exhibit 49B. Dr. Foster, looking first of all at the large map since it may be more readily visible, what is the location of the old Dunbar School as it was established with the relationship to the Roosevelt School?

A. I believe it would be fairly close to the Roosevelt School and to the east.

Q. That is the present MacFarlane School building?

A. Yes, slightly to the south but mostly to the east.

Q. All right. What is your understanding about the operation of the old Dunbar High School?

A. My understanding is that it does have to do with attendance zones. It was a city-wide zone and it was all black in its student assignment and all black in its faculty assignment except for maybe one or two persons in a special teaching

field, and I think it was driver training, and the old Dunbar High School, as I say, drew from the entire city extensively. It was an open enrollment school. I do believe that at one point there were certain grades assigned to it from one of the elementary schools close by. It was either Weaver or Willard. I believe in 1942 Willard and Garfield 7th grades were actually assigned to Dunbar rather than given a choice of attending it. Theoretically, at least, anybody could opt to attend or choose to attend the old Dunbar High School but in practicalities, only blacks chose to do so. I think it had a strong effect on the development of Roosevelt since it was very close to Roosevelt and the testimony in other evidence suggested there was some interplay between the two schools in terms of blacks going to one or the other as Roosevelt became increasingly black in 1947 and was 15.3 percent black. In 1951, it was 31.5 percent black and in 1963, the year after Dunbar became MacFarlane, Roosevelt was 94.5 percent black.

Q. Dr. Foster, the earlier demographic map is now covered up, but there were white people south and to the west of the Roosevelt zone who walked past or walked longer distances to Roosevelt than they would have had to walk to Dunbar; is that correct?

A. Well, this is correct. They could have opted to go to Dunbar, but as I stated, I believe no whites did so.

Q. Well, when Dunbar was opened, was there any action taken identifying that school as a black school or white school aside from those you have already mentioned?

A. You mean other than making it a city-wide school and assigning black faculty?

Q. Well, I didn't realize you mentioned black faculty.

A. Yes, I had. I know of no other official action.

Q. What is the effect, and if you can reference it to your experience, of establishment of such a school in proximity to Roosevelt with the all black faculty?

A. Well, it was clear that the old Dunbar was an all black school. This allowed blacks to opt out of Roosevelt and go to MacFarlane — I mean to Dunbar, and essentially in

my opinion accentuated at that time the whiteness of Roosevelt and the blackness of Dunbar.

Q. Do you know the date the old Dunbar School was built?

A. I have it, yes. If I am not mistaken, it would have been 1931. This was as of the date of original construction for MacFarlane.

Q. Assuming it opened during the thirties, are you aware, Dr. Foster, that it was the policy of the Dayton Board of Education to refuse to permit black teachers to teach white children in the system at that time?

A. Yes, I am aware of that.

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[R. I. 1522-1526, Vol. 15] Q. Dr. Foster, the record reflects that it was the policy of the Dayton Board of Education to refuse to permit white children to be taught by black teachers. What effect in terms of possible white attendance at Dunbar, does the combination of that policy, with the assignment of an all-black faculty which you have already testified to, to that school when it opened, have?

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A. I think potentially it is obvious, as I said before, that a white child could opt or choose to go to Dunbar, but for all practical purposes, white children didn't do this, and the fact that black faculty were assigned in toto to Dunbar would certainly indicate, I don't know whether legally or not, in terms of Board regulations, that white children couldn't go there, but on the face of it they wouldn't.

THE COURT: Dr. Foster, in your research and preparation for your appearance, have you found anywhere any evidence that white children were refused admission to Dunbar?

THE WITNESS: I don't believe so. I can refer to one thing from an exhibit.

THE COURT: If you would, please.

THE WITNESS: I believe it is Plaintiff's Exhibit 28, which is a memo by Superintendent French. I think this essentially answers your question. He says, "Dunbar has no boundary. Theoretically any child can elect Dunbar, but practically only Negro children attend."

THE COURT: You may proceed,

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Q. Dr. Foster, referring now to the criterion which you discussed, transfer of policy: Did you examine transfer policies in the Dayton School System?

A. Yes, I did.

Q. Now, you have already testified, I believe, with respect to the statement in the minutes, as to the elimination or reduction of transfers at the time of the option of the optional attendance zones.

What did your examination of these policies indicate from that point?

A. There were some records in the testimony which I won't discuss involving this. There was one exhibit which is PX-16, which it states that in 1969 whites were given emergency transfers from Roosevelt to Stivers, and further than that, my examination led only to review of the transfer policy, or the freedom of enrollment policy, which was adopted in 1969, and as I understand it, has been continued through the present contained in Plaintiffs' Exhibit 16, which sets up a priority for transfers, and further examination of Plaintiffs' 16-D and 16-F gives some hard figures about the results of this policy since its inception.

Q. And what effect has this policy had on segregation that exists in the Dayton School System?

A. From my understanding of the data, I would say that the hardship and emergency clause in the transfer policy is pretty racially mutual. That is to say, that in 1972, according to Plaintiffs' Exhibit 16-F, 260 blacks —

THE COURT: Doctor, may I ask that you not quote

from the exhibit. If you have referred to it, I assure you I will check it.

I'm intentionally interested in your conclusions. I'm not interested in the figures. They are available.

THE WITNESS: All right. My conclusions are that the hardship policy led to primarily whites moving to white schools and blacks to black schools.

My conclusion concerning Exhibit 16-D, which had to do with Dayton for the four years of the total transfers, indicate that in no cases, for all practical purposes, did whites transfer to white schools, and there was some movement of blacks to white schools.

BY MR. LUCAS:

Q. In terms of its effectiveness in eliminating patterns of segregation, do you have an opinion as to the effectiveness of the present policy?

A. I would classify it as minimal.

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[R. I. 1533-1540, Vol. 15] Q. Now, Dr. Foster, assume, if you will, though there is some difference in the testimony, that the policy of the Dayton Board of Education with respect to faculties, which I believe was one of your criteria, has been at least until 1951 of never assigning a black teacher to teach a white child, and then the pattern which you yourself noted through 1957 of the assignment of some black teachers to schools with large numbers of black children, and then the continuation of a pattern of relationship between a number of percent of black pupils and a number of percent of black teachers in schools until the current school year.

Do you have those facts at this point?

A. I think.

Q. All right. And then assume that there is a substantial reassignment of a faculty in the system. Again, there is some disagreement at this point as to whether or not there is still

a relationship to density of black pupil population and the numbers of percent of black faculty.

But assuming that has been, let's call it, for the sake of this hypothetical, a perfect racial balance of faculty.

In light of that history, could you give us your opinion as to the effect, first of all, of that policy before the change, in terms of identification of schools as black or white and the effects of that change on the present situation in the Dayton School System?

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A. Well, my opinion is that this policy and practice before the change we assume took place, especially since it is in a northern district, would indicate that the Board is missing or has missed a golden opportunity to prove that it does want to run a unitary system and remove segregation practices insofar as it is able, because the Board clearly, as I understand it, under most State laws, or all State laws, can assign teachers willy-nilly in the System wherever they want to. This is not a free choice matter.

Q. Is it also an annual option that the School Board has?

A. Yes, in terms of assignment. In terms of my opinion on what this does, as recently changed, assuming this, I would have to say that this does not remove by any means the vestages of a segregated system since it is only one component of several important aspects of a system segregated or desegregated. I think it is a very important component, and I think it is a step certainly in the direction of desegregation, and a very positive step.

But coupled with the other most important step of pupil assignment, so long as the schools themselves remain segregated, as they certainly do at this time in my opinion in Dayton, then the fact that teachers or staff being desegregated, if we assume that doesn't carry near the weight it would if the total desegregation process had taken place.

Now, if I can go a step further in my own opinion on that briefly: If in fact all these components were taken care of

and we had a truly desegregated system, I would hazard that even then it is going to take a year or two for the identification of schools as black or white to be removed, but we haven't been doing that long enough to really know how long it does take. But I think that in some systems that have done this completely two or three or four years ago, they are very definitely and quickly no longer thinking of schools as black or white but as just schools.

Q. Dr. Foster, did you observe when examining the construction pattern and the additions to schools a pattern of assignment in that regard of faculty?

A. Yes.

Q. What was that pattern?

A. The pattern was largely one of assigning faculty by race according to the race of the school.

THE COURT: Mr. Lucas, could we now drop that issue? I think we have abundant testimony the School Board did assign black teachers to black schools and white teachers to white schools. Let me say I am aware of that. May I ask that we now abandon that for evidentiary purposes.

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Q. Dr. Foster, you used the term pattern. Is an important element the assignment of a particular percentage of black or white faculty to a particular school or is it something that can be considered in the context of a single school?

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A. I think I have already stated that these things have to be considered in the total configuration, and that assignment of teachers to any one school in the system is no indication of the pattern.

BY MR. LUCAS:

Q. Dr. Foster, I think we have covered your criteria.

A. As a matter of fact, we have not.

Q. I was looking for my list of criteria.

THE COURT: I do trust, Dr. Foster, that these are now different criteria that we have not covered.

THE WITNESS: Yes, and I think there is one left.

THE COURT: I would be most interested in hearing from the witness.

THE WITNESS: And some of these really fit in more than one example. They are overlapping so that it is simply a matter of judgment as to assigning them to one classification, but in the problem of great organization, I chose to put the establishment of the middle schools in 1971, and simply point out that these five middle schools which were established marked again a fine opportunity for the school system to illustrate that they were all for desegregated systems because one of the —

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THE WITNESS: All right. My conclusion is that the establishment of the middle schools in 1971 resulted in the establishment of four out of five schools that were clearly racially identifiable, therefore, increasing or maintaining segregation as opposed to availing the opportunity of decreasing it.

Q. Which were the four of five that you considered racially identifiable?

A. Cornell Heights, MacFarlane, Whittier, and Orville Wright.

Q. Now, Dr. Foster, in your review of these criteria and as you have testified, they are inter-related and somewhat interdependent. Do you have some general conclusions from your examination of these criteria?

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A. Well, in the interest of brevity, I think I could summarize each one of them with a sentence or two, but I will forego that arrangement and simply say that taken individually or in isolation, any of these criteria or different components of any of these criteria might suggest otherwise, but basically I think the examples and illustrations I have given and not

summarized illustrate that the results of the Board in the last 20 years, mainly the period in which we have been reviewing in Dayton, the results have been to either increase segregation or maintain it when taking all of these things in a total pattern or configuration. In some cases, I think it was very clearly indicated, and I hesitate to use the word purposeful, but I think a better word that would describe my feeling about Board action in these matters is predictable, and I realize in saying that that hindsight is always better than foresight and much easier, but I think from going over the data and analyzing it, it is pretty clear in many cases the Board was aware of what was likely to happen, and I think the results as I have attempted to analyze them and display them have indicated what did happen.

Q. Dr. Foster, without going into any great detail, the pattern of school construction, wasn't particularly one which you took into account in coming to your general conclusion?

A. Very definitely, particularly the decisions involved in the west side arrangements in 1953 and the building additions.

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[R. I. 1548, Vol. 16] A. Yes, I found in checking against this there were in building additions — I had stated there were 62 school additions to the present. Actually, there were 33 for a total of 95 additions since 1950. Eighteen of these 33 additional ones were made to schools which at that time were 90 percent or more black or white. This means out of the total of 95 additions, there were 78 additions made to schools 90 percent or more black or white. Seven of these additional 33 building additions were not made to this type of school.

Q. That's seven more than the 18 of 33?

A. That's correct, making a grand total of 9 which were not made to schools 90 percent or more black or white when they were added, and then 8 of these 33 additional I found I couldn't decide what their racial composition was at opening because of incomplete data. So, I classified those as uncertain. Those included additions to Drexel in '54 and '56 and additions

to Greene in '57 and additions to Highview in '54, two additions to Irving, one in '54 and one in '58, and an addition to Jackson Elementary in '53, and an addition to Westwood in '60, and I think there has been a good deal of testimony and some exhibits about those schools as changing schools.

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[R. I. 1590-1591, Vol. 16] Q. The one thing that the maps clearly show us in the Dayton situation is that there has been very little change in the attendance zones over the past 20 years, isn't that right?

A. I believe I agreed with that, yes, sir.

Q. All of the school attendance boundary lines have remained relatively stable for the past 20 years?

A. That's correct.

Q. And I think you have also indicated that that is especially true when you compare the Dayton situation to many other systems, such as Detroit, where you have made observations?

A. I think I made that reference, yes.

Q. And that is true, isn't it?

A. I would say so as a generalization, yes, sir.

Q. Another thing that just a glance at the map makes very clear in this case is that the optional attendance zones are all located approximately equidistant from the two schools that are affected by them, isn't that right?

A. You are saying equidistant from the site population of each of the options that can be selected to the total optional zone?

Q. That's right. In other words, they are in the middle area between the two schools that are involved?

A. Well, they have to be in the middle area between the two schools, but that is one thing; to say that and something else, that they are equidistant from the two sites.

Q. Now, I'm lost.

A. Well, I understand your original question to say do I agree that the optional zones in Dayton are equidistant to the

schools which they serve, and by that I understood you to mean the school building sites and not the total attendance areas. If you are talking about the attendance areas, I would agree, yes, sir.

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[R. I. 1627-1630, Vol. 16] Q. Then, let's go to the optional zones where you spent a good deal of time on your testimony last Wednesday. You would agree with me, would you not, that even if you don't approve of optional zones as good administrative practice that they are an extremely widespread administrative device in school systems and that they often exist for the most innocent and legitimate of reasons?

A. Well, no, I don't think I would agree with that completely. I think they are becoming much less widespread than they were because in many cases they were used for segregation reasons. I think they are used for legitimate reasons, but I I think again administratively except on a very temporary basis they are bad news.

Q. All right, but let's go back to the fifties and sixties. They were very widespread, then, were they not?

A. In Dayton are you saying?

Q. No, throughout the country.

A. Most of the systems I have examined at that time — not most, but quite a few of them had them, yes, the big city systems especially.

Q. And a good many of them grew up with the idea that if there is no great administrative problem created, there is no reason not to let people go to one of two schools if it is equally close to go to either school; isn't that right?

A. That's a little complicated.

Q. Let me try to break it down. I live on Block A and I have got a school that is three blocks one way from me and another school that is three blocks the other way from me. So, as far as I am concerned, it is just as easy to go to one school as the other, and the reason optional zones grew up in educational systems at least in part is from the feeling that if it

creates no great administrative problem to the school system, why not let Greer go to School A or School B.

A. I wouldn't agree with that.

Q. You wouldn't? In understanding optional zones, you would agree, would you not, that you have to consider many of the same safety and access factors that are involved in setting fixed attendance zones?

A. Well, I won't argue with Dayton's rationale for creating optional zones, but I think I stated this is the first case I know of access being used as a basis for the creation of optional zones. That's a new one on me, and I don't really see that there is, you know, a need to create an optional zone in this case. Why not assign the children one way or another and draw your line and then change the boundaries later when the proposed changes in the area come off. I think that would remove the possibility of your being questioned or being suspect in the creation of an optional zone especially if it has racial possibilities.

Q. Nobody was questioning optional zones back in the fifties when these were set up, were they, Dr. Foster?

A. Well, I don't know as a matter of fact.

Q. And the optional zones that appear in the Dayton School System are scattered to the east and to the north as well as in the west side of Dayton, aren't they?

A. I believe they are all over the system, yes.

Q. Now, in an optional area the option runs to all students who are living in that area regardless of their race, doesn't it?

A. It is supposed to, yes.

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[R. I. 1635-1636, Vol. 16] Q. Now, you have identified and discussed three high school optional areas. The first one that you mentioned was a small area that was created between Roth and Fairview in 1965; isn't that right?

A. That's what I have on my notes, yes, sir.

Q. And according to all the information that is available,

there were no students that went to any schools in that optional area between 1965 and 1971; isn't that so?

A. Well, I think I testified that I understood it was a very small number and something less than five students, I don't have the date for that.

Q. If I could refer you to Defendants' Exhibit CL.

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Q. Am I not correct that according to this information there have been a total of three students attending either of these schools from this optional area and that all three of those students have been in the last two years?

A. That is correct, I believe.

Q. And that there were no students attending either high school from the optional area between 1965 and 1971?

A. According to the exhibit, that is correct, yes.

Q. Now, let's then move to the Colonel White-Kiser optional area. I think you told us on direct examination that in the four school years from 1967 through 1971, 102 white students from that area went to Kiser and 27 white students from that area went to Colonel White.

A. Those are the figures I had, yes, sir.

Q. And in the preceding five school years, from '62 to '67, there were 26 white students going to Kiser and 58 white students going to Colonel White?

A. That would seem logical, but my notes give '62 to '65, and I'm not sure what it is.

Q. You are missing a couple of years there?

A. Apparently. I may have made simply a mismark.

Q. All right. This optional area was created in 1962, was it not?

A. I believe so, yes.

Q. And all of the students in the area appear to have been white students, were they not?

A. I believe so.

Q. Colonel White appears to have been the school of

choice of these students if we look at the figures as to who went where, at least up until the last four years?

A. I believe so, right.

Q. Then you gave us on your direct examination the student composition figures between Kiser and Colonel White for '67 to '72.

As of 1962, when this optional zone was created, both schools were predominantly white schools, weren't they?

A. Yes, that is correct.

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[R. I. 1642-1643, Vol. 16] Q. And then the change that came in the optional area came about at a time that Colonel White changed to a four-year high school, so that it was no longer necessary for the students to matriculate from Colonel White up to Fairview?

A. That's correct.

Q. And the only change that was effective at that time was to carry the rest of the option down to the natural boundary of Wolfe Creek, and the change really only involved a couple of city squares, didn't it?

A. In terms of actual residential area, you mean?

Q. Yes.

A. I believe that is reasonably accurate, yes.

Q. All right. Now, at the time these few squares were added to the optional area so that all of the students in that area could go either to Colonel White or to Roosevelt High School, the population of the optional area was predominantly white, although there were some blacks living there, isn't that true?

A. I believe that's correct, yes.

Q. The optional area itself hasn't changed at all, has it, insofar as its boundaries are concerned, in the fifteen years that have passed since 1957?

A. I don't believe so, no.

Q. The population of the optional area, however, has become predominantly black, isn't that true?

A. I would judge so, yes.

Q. And if the school board had wanted to use this optional area as a device for keeping blacks out of Colonel White High School, it could easily have transferred the entire area back to Roosevelt with hard boundaries once the population changed, couldn't it?

A. Well, I think under the freedom of enrollment business they would have been able to go in anyway if there had been capacity in Colonel White.

Q. Freedom of enrollment didn't come in until 1969, did it?

A. That's right.

Q. The effect of this optional area has been to bring more black students to Colonel White High School, has it not?

A. Only in the past three or four years has that had any effect.

Q. Since 1968?

A. That's my understanding, yes, sir, my figures.

I don't have figures between '63 and '68.

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[R. I. 1679, Vol. 18] THE WITNESS: Well, I think you do what you can in a situation like this, and I think we suggested some of those things of making different choices in terms of boundaries and in terms of additions, and I think the Board took the worst possible move that it could in this whole west side situation and, in fact, hastened the impaction of this area and made it quite clear to all concerned that this is where it was headed, but basically I think I would agree with what has been said that as it does work out in fact in some cases, this may be simply a delaying tactic, and I don't think that anybody knows that when you are doing it. You can guess and make predictions.

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[R. I. 1683-1687, Vol. 17] Q. Dr. Foster, did you testify, and I understand that you did testify, that in your opinion

what was done in the west side determined or communicated what was intended to happen in that area? Was that your testimony?

A. I believe it was, yes, sir.

Q. Dr. Foster, let us assume that instead of making the changes that were indicated, for example, carving out – I believe this Miami Chapel-Whittier option was carved out exactly from the Wogaman zone, that portion in Greene, is that correct?

A. I believe that's what we testified to, yes, sir.

Q. Instead of doing things like that, Dr. Foster, if they had taken white children from many of these areas and assigned them to Wogaman instead of leaving a cored area of black schools, if they had assigned 60 percent of the enrollment as white students to Wogaman and 60 percent of Willard's enrollment is white, and 60 percent of Garfield is white, and then taken the black students from those schools, whether they shrunk the boundaries or adjusted them in other manners, and assigned them to other schools in this area, would that have changed the perception of what was intended to happen in there?

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A. Well, I think this is the crux of what I have been trying to say. So far as I know, this characterized the duality of the date and system in that in my analysis I remember no place where white students to any degree were in fact assigned to black schools, and at the point that a system begins to do that, then I think they are serious about desegregation.

BY MR. LUCAS:

Q. Would that in your opinion have any effect on the stability, in terms of the change in the area? Assume an assignment of a substantial number of whites to those schools.

A. Well, to the extent that school patterns and residential action interreacts, I think it would, yes.

Q. The Court also inquired, Dr. Foster, about the question of other remedies.

What effect, if any, does school construction, selection of alternate locations for schools, and school additions have on the racial composition of the schools?

A. Well, I think I've testified that in my opinion the building additions that were used in Dayton by and large in a sense took the place of changing zone lines in terms of maintaining existing racial patterns and compacting them.

Q. Are you familiar, Dr. Foster, with the Nashville plan, where the court forbade the construction of any additions to the outlying white schools which were not desegregated under the plan?

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A. Yes, I am familiar with the Nashville plan.

BY MR. LUCAS:

Q. And what effect would such policy of restricting construction of predominantly white schools have in the context of a system-wide desegregation plan?

A. Well, it essentially makes it more difficult for whites to take advantage of spaces available in the suburban areas.

Q. Now, Dr. Foster, in terms of the cross examination about the criterion, the what you call common perceptions of the neighborhood school, you testified that the walk-in school was one of the perceptions, is that correct?

A. That's correct.

Q. In the State of Ohio, and I believe your testimony was this, that between 40 and 50 percent of all children ride to school on a school bus.

Does that indicate a neghborhood pattern of attendance in the state, or what does it indicate?

THE COURT: Mr. Lucas, that question really is quite deceptive.

Would you restate that in terms of the percentage that are bussed in metropolitan areas?

I'm a native of Ohio. I'm quite familiar with the extensive bussing that goes on in rural areas.

Dr. Foster observed at one point of the consolidation procedure that this is well known in the State of Ohio, but that figure standing alone really has no meaning.

It had no meaning when Mr. Greer mentioned it. But I would be interested to know of similar information in metropolitan areas.

Do you know, Dr. Foster?

THE WITNESS: I'm afraid I don't.

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T. TESTIMONY OF NELSON WHITEMAN.

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[R. I. 1748-1750, Vol. 17] Q. All right. And then the counsellors made the decision as to how many students would get in. And how many would you take in an average class before 1968?

A. Well, before 1968 we would take most anyone that applied, providing he was passing and had a good attendance record.

Q. Okay. Before that time, since 1914, really, when it was founded, Patterson had operated below capacity, is that correct?

A. That's right.

Q. In 1968 — I'm sorry. Let's go back.

Were you there in 1953?

A. I came there in the fall of 1953.

Q. All right. Was there any black teachers at Patterson at that time?

A. No, sir.

Q. Were there any black counsellors?

A. No, sir.

Q. And the admission process was through black counsellors, is that — I'm sorry. Through the counselling department in each division?

A. Yes.

Q. All right. And how long a period was it before you had any black teachers at Patterson?

A. I can't answer that exactly. In the early '60's we had one black teacher in the medical arts department, but I can't —

Q. I'm sorry? What department?

A. Medical arts, but I can't tell you the years.

Q. All right. When did you get your first black counsellor?

A. '68 or '69.

Q. So until that time the primary admitting unit, or until 1968 at least, the admission process was through the counsellor, and you had no black counsellors, is that correct?

A. That's correct.

Q. By 1969 how many black teachers did you have?

A. 1968?

Q. Yes.

A. I don't know that we had any. I can't say for sure but I don't know that we had any in 1968.

Q. Was it the '69-70 school year that you got your first black counsellor?

A. I would guess the '69-70 school year, yes.

Q. Right. Now, was it the '68-69 school year that you had the policy change about the 10 percent?

A. No. The '68-69 school year was the first year for the freshman class.

Q. All right.

A. And the 10 percent was established for the first year because the total enrollment city-wide was 5,000, and we were shooting for a mark of 500 freshmen.

Q. So you took the 10 percent for each school for the '68-69 school year?

A. Right.

Q. That's what I want to understand.

Now, what was the admission process, the '68-69 school year? If you can just sort of trace for me, what the average child who was interested in Patterson, what process would he follow to get in?

A. Okay. In the '68-69 year we visited the elementary schools and we put on a program that was very similar to the one we put on in the high schools, to present to the students

the opportunities that were available to them at Patterson Co-op.

Q. Was this an all white presentation team?

A. In '68-69, probably.

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U. TESTIMONY OF WALTER M. BAGWELL.

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[R. I. 1848, Vol. 18] A. Right.

Q. And so instead you built additions in a particular area and you avoided the problem of boundary adjustment.

A. Right.

Q. Would you agree that in effect then, when you add — put an addition to a school, that as far as that space is concerned, you determine the boundaries and they are coextensive with the original boundaries of the school? Is that a fair statement?

A. I would say so.

Q. Pardon?

A. Yes.

Q. All right. So that if a school is already 100 percent black and you are making an addition to that school, you in effect have determined the boundaries to be that creating a hundred percent black school unit?

A. That's right, in most cases it was.

Q. All right. And for those primaries that opened a hundred percent black or white, the same would be true, although we call those new schools?

A. Right.

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V. TESTIMONY OF RALPH CURK.

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[R. I. 1922, Vol. 19] Q. But it was the co-op school for Patterson; is that correct?

A. That is correct.

Q. Now, this was a city-wide ninth grade. Were there any other ninth grades in the System that you know of?

A. Not to my knowledge.

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W. TESTIMONY OF WILLIAM GOFF.

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[R. I. 1962-1963, Vol. 19] Q. What had been the practice of the Board with respect to transportation of students insofar as distances are concerned?

A. You mean prior to this policy?

Q. Prior to and after 1966.

A. Well, after 1966 the policy as it is stated here, did establish a 1.2 radial distance from an elementary school, that is outside the 1.2 mile, being a transportation area.

It also set up a series of criteria for high school transportation, too. The State law, as you are probably aware, does require only that students who are in elementary schools be transported if they are two miles or more from their school of attendance. This was at this time.

Q. All right. Was that the practice and policy of the Board?

A. The practice of the Board made use of the permissive part of the law which allowed over one mile from the school. So the 1.2 mile policy that was established here fit into the practice that was being exercised in 1966.

Q. What were the financial implications of the Board's transportation policy in the '60's?

A. Well, as a flat rate school district, the district received nothing for any kind of transportation of regular students.

There was reimbursement for handicapped children attending Gorman School for Crippled Children.

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[R. I. 1998, Vol. 20] A. The primary limitation in setting up the sites was the one and a half mile direct travel distance which was the transportation policy so that the youngsters could walk to the school rather than be involved in transportation. There were a number of other sites suggested, were there not? If I can name a few, tell me if I am correct. Jane Addams was suggested as a middle school, was it not?

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Q. Jane Addams, Meadowdale, Brown, Emerson, Kiser, were those some of the other schools?

A. I think some of these were identified in an Ohio State study prior to the time that we finally set them up, yes, sir.

Q. Emerson is actually a former junior high school; is that correct?

A. I believe so.

Q. And that would make it particularly suitable for conversion to a middle school?

A. Yes.

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X. TESTIMONY OF LORANA MADELINE DORSEY.

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[R. I. 2013, Vol. 20] Q. Was there a swimming pool?

A. Yes.

Q. When you were there, how many black students were there? Were there a lot or a few?

A. Not over 25, as I recall.

Q. All right. Were black students permitted to use the pool?

A. No.

Q. Was there a meeting between black students and the representatives of the school?

A. There was.

Q. And what was the purpose of the meeting?

A. To ask the reason why we weren't permitted to use the swimming pool. They would take it under consideration they said, but nothing came of it.

THE COURT: Mr. Lucas, I would like a date.

MR. LUCAS: Yes, sir.

BY MR. LUCAS:

Q. When did you graduate from Stele?

A. 1930.

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VII. RELEVANT PARTS OF THE RECORD OF THE REMEDIAL HEARINGS HELD IN DISTRICT COURT IN FEBRUARY OF 1975 (R. II.).

A. TESTIMONY OF ROBERT O. GREER.

[R. II. 156-157] Q. What advice did you give with respect to the subject first of just pairing of schools?

A. Our advice after consultation with regional specialists and others was that pairing in the city of Dayton would seem to be not appropriate at this time in 1975.

Q. And why is that?

A. You are quite familiar I am sure, Mr. Lucas, with the different enrollment patterns and enrollment fluctuations since 1968 and since 1971 and 1972. The Dayton School System has lost a little over 10,000 pupils, a little over 1,500 in the high school grades and the others in elementary. That is one complete high school. You could pull out of the other 7,500 several elementary schools.

When you look at this loss pattern and we looked at the proximity of buildings now existing, you would have to have close proximity of different types of buildings racially in order to make the kind of switch and pairing that is necessary.

Q. You are assuming only contiguous pairing; is that correct?

A. No. Do you want me to complete that?

THE COURT: Please continue.

THE WITNESS: It was our feeling that if pairing were done with contiguous kinds of pairing, that this, then, would require a number of boundary changes, a number of pairing changes within rather rapid periods of time. The turnover rates in most of the big cities including Dayton in pupil population is very rapid. You may find some classrooms that change completely during a grading period because of mobility of the population, black and white.

Therefore, it seemed unwise to us to advise at this time using a method that has not been working too well either in other systems during the last five years or in the city of Dayton based on the enrollment pattern.

* * *

[R. II. 182-87] Q. Now, if I understood your earlier testimony correctly, you have indicated that in your opinion one of the problems with pairing and similar concepts in Dayton arises from the mobility of the Dayton population.

A. Right.

Q. With respect to mobility within the school system itself, could you explain to us what you mean?

A. This is what worried us when we listened to the various reports and went back over our mobility excuses over the past five years at least. I don't know whether people in big cities like Dayton move because of jobs or housing or because they are forced to move because of absentee landlords or what. That wasn't our purpose to find out, but in fact children and parents do move frequently in a city such as this and they are moving frequently here from one area to another, and as I said earlier, I think, to Mr. Lucas in response to one of his questions, you may have an entire room in a grade level change every six weeks.

Now, this is an awful thing for a teacher to face who doesn't understand all these varied kinds of people without staff development, and it is an awful thing to try to pin down enough to say let's pair this building with this building right across here and in a number of cases as you look at Dayton, you are going to be pairing an all black building with an all black building and that is not going to help anything or if you pair it with a building that may be all anglo in certain sections, you are pairing poverty with poverty and that doesn't answer any question.

It was our belief that the system should look at the methods which would bring together a multi-ethnic and multieconomic kind of grouping with their offerings or at least offer some kind of method which would bring more of different kinds of people in different economic levels together so they could all learn about everybody's contributions without pairing poor and poor or black and black.

I don't know. Did I answer your question?

Q. Yes. I think you did.

You also discussed a different type of mobility which was mobility out of the school system itself, and could you explain for us what has been the pattern in Dayton and in similar communities with regard to that kind of mobility?

A. Well, in any system where you have over an extended period of time confrontation and lack of confidence and credibilty of the system, and in credibility of the system I don't mean to be derogatory about Dayton. This has happened in every big city in this country where people have lost confidence in State Departments of Education as well. They say none of us are doing anything. You can immediately start looking for the flight of people to the suburbs, the greener pastures, and at first we looked and we said okay, white is running. That was the common term, and we took a good hard look and we found out the affluent black was running too, and we were all running from the poor and from those who we considered less learned. We were running from the places where industry had decayed in a city. We were running from

where jobs were different and we all seemed to want to find the place that was perfect for us on the fringes of a city.

First you moved to one edge of the city and then completely out of it and if you follow the pattern in Dayton, it is just like every other big place where this has gone on for a period of years.

Now, if the affluent whites move and the affluent blacks run either outside or to parochial schools or some other place, you have left a city of poverty and whatever. It can be black, it can be Appalachia, or anything else, any kind of mix, but you just have a poor city and a poor school system.

What we were trying hopefully to discuss with the School Board when we met with them and the Administration was get your minds on building the kind of quality that will hold all the people in the system and then if you have got to build buildings to get them back together, then build a better rat trap and call the population back. You might as well do it as a school system because the businessmen are sitting out there waiting until the whole thing decays and they will buy it up and build up the most beautiful kind of city all over again and maybe the same folk that are in it won't even be there.

I apologize, Your Honor.

THE COURT: To the contrary Mr. Greer, in a problem that has complexities beyond my ability to understand, you have been very helpful.

You may proceed, Mr. Greer.

BY MR. GREER:

Q. Has the experience with certain types of desegregation plans including pairing techniques been to accelerate this movement out of the inner city process you have described?

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THE WITNESS: As I answered before, in specific instances, pairing just wouldn't work because of the types of youngsters and economic level of the areas and the fact that

usually in inner city you will find a number of elementary schools have been built as the black population increased in the inner city. Another elementary school was stuck up to take care of the overload, so you had so many black schools until there is hardly anything to pair them with, and if you did pair across, it is with another elementary of poverty over here at the other racial level that happened to get stuck on the edge of that ghetto.

The poor are always there with us, and I don't care what color they are, cities have just stuck them in these situations, so the level and quality of educational offerings is not good for white or black.

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B. TESTIMONY OF GORDON FOSTER.

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[R. II. 199] Q. State your full name and occupation, please.

A. Gordon Foster. I am a professor at the University of Miami in Coral Gables, Florida.

MR. LUCAS: Doctor Foster's qualifications have already been tendered to the Court.

THE COURT: Yes.

BY MR. LUCAS:

Q. Doctor Foster, have you had an opportunity to examine Defendant's proposed plan of desegregation?

A. Yes, I have.

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[R. II. 223-227] Q. Do you know what the approximate cost of the total magnet school program has proposed in the Board's plan was?

A. As I recollect, it was around three or four million dollars.

Q. I believe the record will speak on that.

Turning your attention to the other elementary magnet programs, can you identify them?

A. There were three magnet programs. One was modern foreign languages at Carlson which would include three blocks in a day in terms of timing with approximately 120 children in a block which would make a potential of 360 students. I believe this was intended to be held on opposite days or opposite schedule from the science business so that it wouldn't interefere with that.

There was a business education skills program at Huffman, and this was for grades 6, 7 and 8 which would encompass approximately 300 students, and the third program was at Kemp which was a career motivation center which was anticipated to interest approximately 220 students at the fourth and fifth grade centers for two two-hour session a week. This is really very much like the current career opportunities programs that are being offered all over the country.

Q. All right. Is it your understanding that these are all part-time programs?

A. That's correct.

Q. And that the base enrollment in each school at Carlson and Huffman would remain the same?

A. That's correct, and the children would be transported in.

Q. Is it your understanding that these programs would use only the excess capacity at the respective buildings?

A. Yes.

Q. Have you examined the freedom of enrollment policies and the results of the freedom of enrollment and transfer policies in the plan?

A. Yes, I have.

Q. Can you describe those results?

A. Well, as I understand the plan, there were two basic plans that had to do with freedom of enrollment or open enrollment. One was called open enrollment which was for high schools only, and that was started just a year ago in January of 1974, and to the best of my knowledge, I found

no reports of how many children moved for open enrollment in this program in a desegregated section. There were no numbers reported at all by race.

Q. Is that the one where they have an enrollment period prior to the opening of school?

A. I understand a child picks three choices, a first, second and third choice and he runs through a randomized process of some sort and if he doesn't get in that, why, then, he is assigned to his nearest high school, capacity being considered.

The freedom of enrollment is essentially what we call a majority-minority transfer program, and the figures for that are given in Exhibit A to the Board's plan. Well, it is really Exhibit B. The figures are 391 in the high school for the 1973-74 school year, and a total of 346 at the elementary and middle schools for that year. Those figures which add up to 737 coupled with carryovers from prior years of 613 and a second semester figure for 1973-74 of 258 give a total of 1,608 students in schools other than their neighborhood schools.

Q. How many of those were black children going to predominately white schools?

A. Well, I have a racial breakdown of receiving schools only for the one year of 1973-74, first semester. That was the 737 figure.

The way I read the data, all but nine of those would be black children going to white schools which I believe was your question.

Q. Viewing the entire desegregation proposal of the Board of Education proposal and the number of children affected by such a plan, do you have an opinion as to its effectiveness as a plan of desegregation?

A. Yes. My opinion is that basically it is a curriculum plan rather than a desegregation plan, that something like a total, a maximum of 6,400 part-time and full-time students could be affected by this plan, and many of those would only be in partially desegregated situations at best. Out of this approximately 6,400 maximum figure, about 3,000 would be what we might call full-time desegregated students. Those

would be the ones at Stivers-Patterson Co-Op and Kiser and Miami Chapel Elementary School.

Secondly, there is no guarantee of the desegregative effect we all know of this program. I think some of the programs are likely to achieve some desegregation although minimal and some will maybe strike out.

Based on past experience in other systems, one would have to be somewhat less than optimistic about the total effect. I think we have mentioned the fact that in the schools where there is just a program such as at Roth, Dunbar, Huffman, Carlson and Kemp, desegregation is essentially not desegregation. It is just a group of kids coming in in an intact group.

Q. In a what?

A. It is a group of pupils being transported into those schools in an intact group, sometimes in smaller groups, but always staying apart from the rest of the school program.

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[R. II. 228] Q. Doctor Foster, at the request of the Plaintiffs, have you prepared a desegregation proposal which has been submitted to the Court and to the Defendant School Board?

A. I have, yes.

• • •

[R. II. 231-233] Q. Did you have that as any sort of inflexible standard or was that a goal?

A. No. I think you will find in the estimates of the individual schools that some of them got a little bit outside that range. The object, in other words, was not to racially balance a system but to remove the racial identifiability of any individual school insofar as possible. There is quite a difference. The techniques as in most desegregation plans were to take the easier things first and see what that would do.

The way the demographic situation rests in Dayton, there are very few instances where you can redraw zone lines between contiguous schools and effect any degree of desegregation. The schools that are in the buff area between the white

population and black population generally are already in a desegregated mix, and then when you get farther out from that center of desegregation, you run into a situation where you are contiguous no longer and at that point you need to consider pairing or clustering.

As was stated this morning or at least partially stated, clustering or grouping is an extension of pairing. Pairing is essentially two schools put together. A clustering or grouping can be two or more.

In a system that is approximately even in racial makeup, pairing works very well if capacity is the same because you can pair one 50-45 per cent black school usually with a white school on the opposite side, only it would be like 90 per cent versus 90 per cent.

Where you run into clustering more than two schools, you usually do it because you have a differential in the capacity which necessitates putting more than two schools together to come out.

So, essentially, the plan developed a serious of elementary clusters. It left four schools the way they are and the original plan recommended we close three schools, and I have an amendment to that if we want to discuss that so that the plan would not involve any closing of elementary schools.

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VIII. RELEVANT PARTS OF THE RECORD OF THE REMEDIAL HEARING HELD IN DECEMBER OF 1975 AND JANUARY OF 1976 (R. III.).

A. TESTIMONY OF WILLIAM M. GORDON.

* * *

[R. III. 18] Q. Could you state your name, sir?

A. William M. Gordon.

Q. And what is your employment?

A. I am an Associate Professor of Education at Miami University.

Q. And what is your relationship to the plan which we have presented to this Court?

A. I directed the team that put the plan together.

* * *

[R. III. 45-46] Q. Would you consider it an adequate desegregation plan if all of the schools, the elementary schools in Dayton which were presently identifiably black schools ended up with the 70 percent black or the higher percentage black and all of the formerly white schools ended up with the higher percentage white?

A. I would hate to see that considered as an implemented plan in the City of Dayton.

Q. Would you want to randomize the proportions?

A. Yes. I would say if that happened, that it would meet those parameters, and if those parameters were acceptable to the Court, I guess then that would be considered a desegregated school system. I don't think it is desirable.

Q. Would you consider that desegregation of the system?

A. No. I would much prefer to see the schools not identifiable, and I think if a school has been historically a white school and then just comes into the bare minimum figures, that it probably would still be perceived as a white school or a black school.

* * *

[R. III. 52] THE COURT: * * * That continued to move to the suburbs is not something that results from the desegregation order, is it?

That has been going on in Dayton for the last 20 years?

A. It was established today approximately 11,000 white youngsters and 900 black youngsters have left Dayton in the last five years.

Q. There has been a substantial out white migration in most urban centers; is that correct?

A. Yes.

Q. And that is without regard to desegregation; is that correct?

A. Yes, it has been going on. In some instances with desegregation and in some instances without.

* * *

[R. III. 61] Q. Am I correct that the open enrollment program does not result in substantial desegregation?

A. Well, we are in Court here now, so I would say yes, you are right.

Q. That is a conclusion at page 30 in your report, is it not?

A. Yes.

Q. Do you have figures indicating how many white students chose formerly black schools on open enrollment? Is that not set forth in the document?

A. Yes, it is in the document.

Q. Was it one, two or three?

A. It is a very small number. I think it was one. I am not sure.

* * *

[R. III. 71] Q. If that pattern reflected that all of the formerly black schools were one-third white and all the formerly white schools were two-thirds white, would that be a racial pattern in your opinion?

A. Yes.

* * *

[R. III. 282-285] MR. LUCAS: This is an offer of proof in connection with the testimony of Dr. Gordon. The Court has indicated that plaintiffs could not inquire of Dr. Gordon into the basis for the rejection of the concept of pairing and clustering of schools, and in particular insofar as it pertains to page two of the cover letter to the board transmitting the board's expert's plan.

That cover letter recited that the reason for not using pairing and clustering was because such pairing and clustering tended to cause white flight. Throughout the document marked Exhibit A on behalf of defendants, there are references to white flight and reasons why actual desegregation was not attempted using one of the major criteria under the Swan case.

Reference is frequently made to the articles by James Coleman, one of which is appended as an appendix to the plan, Exhibit A in this record.

If permitted to inquire by the Court, I would offer as Exhibit I to this offer of proof and this record an article appearing in the New York Times July 11, 1975 entitled "Coleman Concedes Views Exceed His Race Data."

In particular, I would have directed the witness's attention to the following paragraphs:

"In answer to questions, he said that his study did not deal with busing, and that his arguments applied to trends in only two or three southern cities.

"Some of the things I said went somewhat beyond the data," he said.

The New York Times article goes on to point out as follows: "However, a thorough check of all 20 cities — in which key officials in each were questioned by telephone — could find no court-ordered busing, rezoning or any other kind of coerced integration in any of the cities during the 1969-1970 period."

Newspaper articles are appended throughout Exhibit A, the proposal submitted to the Court by the board. Therefore, this article would have been offered in response.

I would also offer a document which I will mark Exhibit II, an article entitled "A Response to Professor James S. Coleman's Recent Research and Statements on Educational Desegregation Efforts" by Robert L. Green, Dean of College of Urban Development and Professor of Educational Psychology at Michigan State University, East Lansing, Michigan, and Thomas Pettigrew, Professor of Social Relations at Harvard University, Cambridge, Massachusetts.

I would have also offered an article appearing in, I believe, the American Association of School Research Journal, the exact title I cannot recall, an article titled "Reanalysis of Coleman's 'recent trends in school integration'" by Gregg Jackson of the U. S. Commission on Civil Rights. That would have been Exhibit III.

I would have also offered an article by Dr. Robert L. Green entitled "On Professor James Coleman and busing — white flight" as Exhibit IV.

As additional support, I would have offered an article from the Dayton Daily News dated Sunday, December 7, 1975 written by Tom Teepen, editor for the Daily News editorial pages. This would be Exhibit V. Similar articles from local papers were offered by the defendants. This article is entitled "SOS Exaggerating 'White Flight' Menace Not Up To Its Billing".

I would have also offered in evidence an article from the Dayton Daily News dated December 8, 1975, page one, entitled "Dislikes busing, desegregation case puts Rubin on spot" byline article by Jonathan Miller indicating that the Court has expressed concern about some of the issues which could have been explored had the Court permitted me to examine the witness in full on this area. It is significant to note that the article indicates that the Judge of this court is concerned that a busing-based school desegregation plan "may so alienate white members of the community that short-term school desegregation may lead to long-term city segregation."

We do not represent that we know these to be the views of the District Court, but that these have been represented to the public at large as the views of the District Court. Of course, the witness's answers to questions might have led to

other lines of inquiry which would have further exposed the reasons for their rejection of one of the Swan techniques tending to demonstrate their choice of a less effective alternative reflecting on two factors; number one, good faith and, number two, intent to segregate.

(End of proffer.)

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B. TESTIMONY OF LARRY W. HUGHES.

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[R. III. 111] Q. Dr. Hughes, did you agree with the statement of the report that appears on page 127 that says it has been found that the relative closeness of Dayton Schools makes long-haul transportation an issue in many cities moot here?

A. I generally agree with that statement. I think it makes it a less pressing matter.

° ° °

[R. III. 141-142] [Q.] What I am concerned about is whether or not in desegregating elementary or secondary schools, you should end up with a pattern of schools where all the formerly black schools were 70 percent black and all the white schools were 70 percent white.

A. I don't think that would be good.

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C. TESTIMONY OF JOHN B. MAXWELL.

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[R. III. 200] Q. State your full name and your occupation, please.

A. John B. Maxwell, Superintendent of Schools in Dayton, Ohio.

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[R. III. 202-204] Q. All right. Has the Board of Education adopted any plan for submission to this Court?

A. No.

Q. Has the Board of Education taken a vote on submission of a plan to this Court?

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THE WITNESS: The Board voted 7-0 to submit the plan but not approve it.

Q. All right. Was there a vote taken on the adoption of the plan by the Board?

A. No.

Q. It was not a motion to adopt the plan, endorse it?

A. There was an amendment to the motion which was defeated.

Q. And the amendment was of what nature, sir?

A. The amendment was to approve the plan, and this amendment was turned down.

Q. And the vote was what?

A. 4 to 3.

Q. Did you make a recommendation to the Board as the chief school officer for the District as to whether or not it should approve this plan that has been submitted to the Court?

A. No, I didn't.

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THE WITNESS: No, I did not.

Q. Has the Board taken any position with regard to some other plan which it would approve for submission to this Court?

A. No.

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D. TESTIMONY OF GORDON FOSTER.

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[R. III. 205] Q. State your full name and occupation, please.

A. Gordon Foster. I am a professor of educational administration at the University of Miami in Coral Gables, Florida.

Q. Dr. Foster, your qualifications have previously been furnished to the Court and you were qualified as an expert with the Court.

THE COURT: There is no question. Dr. Foster is an expert in this field, and I am pleased to hear from him.

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[R. III. 230-232] THE COURT: Okay. So, if we have a school 33 percent black and 67 percent white, that is not racially identifiable?

THE WITNESS: No. I think what you are referring to is I was speaking about the high schools, if all the white schools come in at 33 percent black and all the black schools come in at 67 percent black or the formerly black schools and white schools, then I would hold they still maintain a racially identifiability rather than if they came in randomized.

THE COURT: Then, racial identifiability is not a function of percentage of students?

THE WITNESS: No.

THE COURT: But you just said that a school formerly –

THE WITNESS: Well, then let me say that it is not the sole function.

THE COURT: And you would draw a distinction between the 67/33 and the 36/64? The three percent would make a difference to you?

THE WITNESS: No, I wouldn't argue too much about that. The thing I would argue more about is, as I say, all the formerly white schools are still predominantly white.

THE COURT: Let's assume we turn it completely around. We will take all the white schools and make them 30 percent white and 70 percent black. What is your view of the racial identifiability there?

THE WITNESS: It would be a lot less than it would be previously, but I think a randomized assignment so that you

don't have any relationship to what went on previously, any fixed relationship, is much better in terms of community perception about racially identifiable schools.

THE COURT: You may proceed, Mr. Lucas.

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Q. Dr. Foster, is what you are saying that you cannot consider any school in isolation from the system in which it exists?

A. Yes. Well, that is one thing.

Q. Dr. Foster, are you familiar with efforts by some school boards to set up a pattern whereby the white schools remain whiter and the black schools remain blacker without reference to particular systems?

Is that something that school systems sometimes try to do?

A. Yes, sir.

Q. Does that protect usually the controlling white population or the white power in the School Board?

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THE WITNESS: Quite often it does, yes.

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[R. III. 249-251] THE WITNESS: As I remember in my response to you [the District Court], I said that that fact coupled with the situation that all the formerly white schools were in the 70 percent range and the formerly black schools the other way around – I am sorry – all the formerly white schools were at 30 percent black and the formerly black schools were at 70 percent black coupled with this difference in my opinion tended to make them racially identifiable.

THE COURT: You may proceed.

• • •

Q. As far as that type of thinking goes into racial identifiability, wouldn't it be true even if you filled Dunbar High School fully with white students, people in a few years are going to recall that as being a so-called black school?

A. As a school that used to be a black school.

Q. And the same thing would be true if you filled Belmont with entirely black students?

A. Yes, sir.

Q. But as far as your own definition of racial identifiability is concerned, that is simply a situation where any school falls drastically outside plus or minus 15 percent from the mean percentage in the school district, isn't that correct?

A. Well, that is part of it. The other part is what we discussed earlier, and that is that you can't consider any one school in exclusion from the rest of the system. The biggest problem is if you have all formerly white schools still predominantly white in a system like Dayton that is about 50-50 and all formerly black schools are prodminantly black. Then, there are quite a few shades of lingering identifiability in my opinion is what I am saying.

Q. This is the third time you have testified in this litigation, is it not, Dr. Foster?

A. I think so.

Q. And do you recall testifying last spring in this case saying, "Well, I think in the final analysis, racial identifiability depends on the individual court's judgment, but my definition in a system that approaches 50 percent black and white would be any school that falls outside drastically plus or minus 15 percent from the mean at any given level."

A. That sounds reasonable that I so testified, yes, sir.

Q. And do you still feel that is a reasonable definition?

A. Yes, sir.

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[R. III. 252] Q. Is it your feeling that in order for a plan of desegregation to be appropriate, there must be an approximate racial balance in every school in the system?

A. No, sir, not necessarily.

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[R. III. 255-256] Q. Under your definition of racial identifiability, would it be fair to say that in the Dayton system

if each school had a one-third to two-thirds proportion of either race, you would not consider the school to be racially identifiable?

A. That would depend on other circumstances also such as faculty assignment, the sort of situation that I described in option B of Dr. Gordon's plan. Numerically, you are right. I would consider those schools not to be racially identifiable, but when coupled with the sort of problem that has been described in option two of the high school plan, then I would have some doubt.

Q. If you get beyond simply numerical consideration of proportions so that you have a mixture of black and white students in a school, don't you get into situations that any school in a black neighborhood is going to have a certain type of perception or any school that has a certain name of past history is going to have a certain type perception?

A. It has not been my experience, no, sir, in desegregated systems. I think after a couple of years the public and the school people, the pupils, everybody tends to begin to perceive of schools as just schools and not as black schools or white schools.

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